Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

ARLENE REYNOLDS,

Petitioner,

vs.

CSX TRANSPORTATION, INC., A Virginia Corporation, and ROGER WIDNEY, a Supervisory Employee of CSX Transportation, Inc.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Is an employer, pursuant to common law principles of agency, liable for a sexually hostile environment created by a supervisory employee who uses his supervisory status to effect and enforce the hostile environment?

II. Is an employer liable for punitive damages, under Title VII or 42 U.S.C. § 1981, for the malicious or reckless retaliatory discharge effected by its supervisory employee, where the supervisor acted with the express approval of upper management in causing the discharge?

III. Have the clearly erroneous factual findings of the Eleventh Circuit caused it to mistakenly reverse the jury's findings in favor of the Plaintiff on her claims of sexually hostile environment and retaliation?

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PETITION FOR WRIT OF CERTIORARI

Arlene Reynolds respectfully petitions this Court for a writ of certiorari to review the opinion of the United States Court of Appeals for the Eleventh Circuit, Case No. 95-3364 (United States Court of Appeals for the Eleventh Circuit, June 20, 1997, rehearing denied, July 28, 1997).

OPINIONS BELOW

On June 20, 1997, the United States Court of Appeals for the Eleventh Circuit issued its opinion (Pet. App. at 1a-22a) affirming in part, reversing and rendering in part, and vacating in part the district court's Order of Judgment dated July 17, 1995 (Pet. App. at 25a-29a). By Order filed July 28, 1997, the Eleventh Circuit denied Reynolds' petition for rehearing (Pet. App. at 23a-24a).

JURISDICTION

The opinion, which constitutes its judgment, of the United States Court of Appeals for the Eleventh Circuit, was entered on June 20, 1997 (Pet. App. at 1a-22a). Petitioner timely filed her Petition for Rehearing which was denied on July 28, 1997. (Pet. App. at 23a-24a). The Certiorari jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The pertinent provision of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, (Title VII), is set forth below:

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer –

> (1) to fail or refuse to hire or to discharge an individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or attempt to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin . . .

The statute pertaining to Reynolds' punitive damage award is 42 U.S.C. § 1981a. The pertinent provision of that statute is set forth below:

> 42 U.S.C. § 1981a. Damages in cases of intentional discrimination in employment
>
> * * *
>
> (b) Compensatory and Punitive Damages
>
> (1) Determination of punitive damages.
>
> A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that

the respondent engaged in a discriminatory practice or discriminatory practices with malice or reckless indifference to the federally protected rights of an aggrieved individual.

CONCISE STATEMENT OF THE CASE

A. FACTS

In February of 1992, Arlene Reynolds was employed by Olsten Temporary Services ("Olsten"), and was assigned to work at CSX Transportation, Inc. ("CSXT"), in the medical records file room. In that capacity, Ms. Reynolds worked alongside three other temporary workers: Ms. Victoria Allen (a black female), Darlene Turner (a black female) and Mindy Jennings (a white female). Ms. Reynolds was 26 years old at the time. All four temporary workers were supervised by a white male named Roger Widney, then age 56, who had been a permanent CSXT employee since 1960. Widney reported to Les Backherms (white male), the Manager of Administrative Services, who reported to Jim Duguid (white male), the Director of Administrative Services.

Shortly after she was assigned to CSXT, Reynolds was subjected to sexually inappropriate behavior by Widney, all within the confines of the medical records file room.[1] On one occasion, Widney passed by her in a very narrow aisle, pausing as his front side was touching Ms. Reynolds' back side. While pausing, Widney stated that

[1] Though Reynolds also asserted claims of racial harassment against CSXT, those claims are not material to this petition.

he and Reynolds were "stuck together like magnets." Ms. Reynolds testified without contradiction that Widney was sexually erect during this encounter. On another occasion, Ms. Reynolds was conversing with Ms. Jennings about Jennings' husband staying out late at night while playing pool. Ms. Reynolds testified that Widney, overhearing the conversation, looked at her and stated, "There's (sic) other things that you can do on the top of a pool table." Reynolds interpreted the comment as a suggestion that she engage in sexual intercourse with Widney, and Widney later testified that he was referring to sexual intercourse, or "foreplay."

On another occasion, Ms. Reynolds was speaking with Ms. Turner as they were looking for jobs in the classified ads of the newspaper. At that time, Widney approached them and told them that he had a job for them at a nude cafe in St. Augustine, which was near Widney's home. Widney then told Ms. Reynolds and Ms. Turner that if they went to work at the nude cafe, he would come and watch them.

On yet another occasion, Ms. Reynolds overheard Widney ask Ms. Allen whether a certain swimsuit manufacturer made swimsuits large enough to fit her. In addition, Ms. Reynolds testified that Widney massaged her shoulders in a manner which she found offensive, in part because Widney's hands strayed downward from her shoulders, towards her breasts.

In addition to this sexually charged atmosphere, Widney also made statements to Ms. Reynolds indicating that if she did not put up with his sexually inappropriate conduct, she would lose her job with CSXT. Reynolds testified that Widney threatened "what goes on in the file room stays in the file room," and warned that if anyone

complained to his superiors, they would back him up. Reynolds also testified that Widney threatened her by telling her, "the first to complain will be the first to go."

After enduring Widney's harassing sexual behavior for four or five weeks, accompanied by his threatening remarks, Ms. Reynolds was subjected to yet another act of sexual harassment in late March of 1992. On that occasion, Widney approached Ms. Reynolds as she was kneeling down, pulling files from a bottom shelf. Widney testified that he thought Reynolds and he were the only persons in the room. As he neared, Widney asked Reynolds if she thought she was "down far enough." Ms. Reynolds replied, "as far as I can go." Ms. Reynolds then attempted to move to the side of the aisle so that Widney could pass her. Instead of passing her, however, Widney approached her until his crotch was at the same level as her face. Widney then laughed and stated, "I'd better stop before someone come (sic) in and thinks something." Immediately after that encounter, Reynolds left the room in tears. She testified that she had "never" been informed of what she was to do if she had a complaint of sexual harassment. Apparently, this was due to the fact that CSXT's sexual harassment policy was not distributed to temporary agency workers.

After leaving the room, Ms. Reynolds encountered Wilbur Jackson, a black employee of CSXT who was also an ordained minister. Jackson noted that Ms. Reynolds was crying and asked why she was upset. At that time, Ms. Reynolds complained to Mr. Jackson about Widney's sexual harassment.

Following Ms. Reynolds' internal complaint, CSXT conducted an investigation into Widney's unlawful conduct. As a result of the investigation, CSXT allegedly

gave Widney a verbal warning, ordered him to attend sensitivity training, and transferred him out of the medical records file room and down the hall to the general claims file room, where he had no supervisory responsibilities. CSXT replaced Widney with a white female named Lana Brantley, who was to be "trained" by Widney.

While training Ms. Brantley in the medical records file room, in April 1992, Widney was approached by Dr. Cook, from CSXT's Medical Department. According to Widney, Dr. Cook told him about a filing error. Significantly, Dr. Cook was not upset about the error; he just wanted the filing done correctly. Widney later claimed that he had reason to believe that Reynolds was to blame for the filing error.

Even though he was no longer supervising the medical records file room, or Reynolds, Widney approached his supervisor, Les Backherms, and told him that he wanted to terminate Ms. Reynolds for the alleged filing error. Mr. Backherms did not investigate Widney's allegation, but instead contacted his manager, Jim Duguid. Likewise, Mr. Duguid did not investigate the information brought to him by Mr. Backherms. Both Backherms and Duguid were aware that Widney recently had been reprimanded and demoted because of the verified allegations of sexual harassment made against him. Furthermore, both men actually discussed the possibility that Widney was seeking to terminate the very woman who had made those allegations. Nevertheless, Duguid and Backherms delegated to Widney the authority to contact Olsten and terminate Ms. Reynolds, which occurred during April 1992.

After Elaine Tisdale, CSXT's Employee Relations Department Senior Director, learned about the discharge, she had Reynolds brought back to her assignment at CSXT, because Tisdale was concerned about the "appearance of impropriety" created by the discharge. After returning to CSXT during April 1992, Reynolds continued to experience an uncomfortable environment created by Widney. Ms. Reynolds testified that Widney came in contact with her on almost a daily basis and that he would: stare at her while she was in the medical records file room; whistle in an irritating manner; and bump into her while passing her in narrow aisles. Reynolds first complained to CSXT about this continuing conduct around May 14, 1992. She next complained to CSXT in September of 1992, after she filed her first charge against CSXT with the Jacksonville Equal Opportunity Commission ("JEOC"), alleging sexual harassment.

It was only after Ms. Reynolds' filed her JEOC charge that CSXT transferred Widney to a different floor, so that he would no longer be in daily contact with her. In addition, it was only after the JEOC inquired about her discharge that CSXT eventually paid Reynolds the money she had been owed as a result of that discharge, in April of 1992.

Almost immediately after Reynolds filed her JEOC charge of discrimination, CSXT began preparing a "position paper," concerning the continuing feasibility of utilizing temporary agency workers at CSXT. Susan Hamilton, Corporate Representative for CSXT, testified that this was the first such paper ever prepared by the company on the use of temporaries. Prepared by James Duguid, the paper recommended that only Ms. Reynolds,

together with three other temporary staffers in the medical records file room, be replaced with permanent CSXT employees. Of the other three women, two had also complained of unlawful harassment by Widney, or had otherwise verified Reynolds' allegations. As a result, in February of 1993, Ms. Reynolds was again terminated from her position with CSXT. Thereafter, she filed a second JEOC charge against the company, alleging that it had retaliated against her for filing the first JEOC charge.

B. PROCEEDINGS BELOW

On July 20, 1993, Reynolds filed suit against CSXT, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. Reynolds later amended her complaint to add hostile environment racial harassment and retaliation claims against CSXT and Widney under 42 U.S.C. § 1981.[2]

After presentation of Plaintiff's evidence, and again at the close of all the evidence, CSXT moved for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50(a). CSXT argued that Reynolds had offered insufficient evidence to support her claims of hostile environment, retaliation and punitive damages. The district court denied the motion in all respects, however, and submitted the case to the jury on special interrogatories.

After a two-week trial, the jury found that: (1) Reynolds was CSXT's employee and therefore could recover on her statutory claims; (2) Reynolds had been subjected to a sexually and racially hostile work environment; (3) CSXT knew or should have known of the

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[2] Additional state law claims, which are not material to this petition, were also asserted against CSXT and Widney.

harassment but failed to take prompt remedial action; and (4) Reynolds suffered retaliation in both 1992 and 1993 for complaining about the harassment. The jury awarded Ms. Reynolds $900 for lost wages due to retaliation; $600 for mental pain and suffering due to retaliation and hostile environment; $167,000 in punitive damages for hostile environment sexual harassment; $167,000 in punitive damages for hostile environment racial harassment; and $166,000 in punitive damages for retaliation. The district court, *sua sponte*, reduced the total of the pain and suffering and punitive damage awards to $300,000, based upon the caps on damages contained in 42 U.S.C. § 1981a, and based upon its finding that the punitive damage awards were excessive. CSXT then moved for a new trial and renewed its motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50(b). The district court again denied that motion and CSXT appealed to the Eleventh Circuit Court of Appeals.

In its Opinion dated June 20, 1997, the Eleventh Circuit reversed the district court's denial of CSXT's Motion for Judgment as a Matter of Law as to the hostile environment claims, based upon its intervening decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir. 1997) (en banc). The Eleventh Circuit upheld the district court's denial of CSXT's Motion for Judgment as a Matter of Law on Reynolds' claim of retaliation concerning her first discharge, in April of 1992. However, the Eleventh Circuit reversed the district court's denial of CSXT's Motion for Judgment as a Matter of Law on Reynolds' second retaliation claim, based upon her second discharge in February of 1993. That reversal was based upon a finding by the Eleventh Circuit that Reynolds failed to present evidence establishing a causal connection

between her complaints in March, May and September 1992, on the one hand, and her February 1993 discharge, on the other.

In regard to Reynolds' punitive damage award on her sole surviving claim of retaliation, the Eleventh Circuit reversed the district court's denial of CSXT's Motion for Judgment as a Matter of Law based upon its intervening decision in *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996). Thereafter, Reynolds filed a Petition for Rehearing which, by Order dated July 28, 1997, the Eleventh Circuit denied.

Petitioner now seeks the review of this Court.

REASONS FOR GRANTING THE WRIT

Three reasons require the granting of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit: (1) the conflict among the circuits concerning the proper standard for determining employer liability for hostile environment sexual harassment, committed by a supervisory employee who uses his supervisory status to effect the harassment; (2) the conflict among the circuits concerning the proper standard for determining employer liability for punitive damages under Title VII and Section 1981; and (3) the clearly erroneous factual findings made by the Eleventh Circuit which caused that court to mistakenly reverse the jury's findings in favor of the Plaintiff on her claims of a sexually hostile environment and retaliation.

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE PROPER STANDARD FOR DETERMINING EMPLOYER LIABILITY FOR HOSTILE ENVIRONMENT SEXUAL HARASSMENT, COMMITTED BY A SUPERVISORY EMPLOYEE WHO USES HIS SUPERVISORY STATUS TO EFFECT THE HARASSMENT.

In reversing the district court in the instant case, the Eleventh Circuit failed to consider that the jury's verdict, expressly finding CSXT liable for Widney's sexual harassment, could be supported on a theory of "indirect liability" (hostile environment created by a supervisor).[3] Instead, the Eleventh Circuit analyzed the case as if it were based solely on direct, rather than indirect, liability and concluded that there was insufficient evidence of direct liability to support the jury's express finding. *Reynolds v. CSXT*, 115 F.3d 860, ___, n.4 (11th Cir. 1997). The Eleventh Circuit based this portion of its opinion upon its intervening decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535-36 (11th Cir. 1997) (en banc). The *Faragher* decision, however, is in conflict with decisions of other United States Courts of Appeals regarding the circumstances under which an employer can be "indirectly" liable for a supervisor's creation of a sexually hostile environment.

In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), this Court described the standard to apply for determining employer liability based upon sexual harassment by

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[3] The terms "direct" and "indirect" liability are discussed by the Eleventh Circuit in *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535-36 (11th Cir. 1997) (en banc).

its supervisory employee. Though declining to issue a definitive rule, the Court stated:

> [W]hile such common-law principles may not be transferrable in all their particulars to Title VII, Congress' decision to define "employer" to include any "agent" of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. *See*, generally, Restatement (Second) of Agency, §§ 219-237 (1958). For the same reason, absence of notice to an employer does not necessarily insulate that employer from liability. *Ibid.*

Meritor, 477 U.S. at 72.

In *Faragher*, a 7-5 decision with three dissents, the Eleventh Circuit determined that there are three ways that an employer can be indirectly liable for the conduct of its agents:

> [G]enerally, an employer may be indirectly liable for hostile environment sexual harassment by a superior: (1) if the harassment occurs within the scope of the superior's employment; (2) if the employer assigns performance of a non-delegable duty to a supervisor and an employee is injured because of the supervisor's failure to carry out that duty; or (3) if there is an agency relationship which aids the supervisor's ability or opportunity to harass his subordinate.

> *See*, Restatement (Second) of Agency § 219(1), (2)(c), (2)(d).

Faragher, 111 F.3d at 1535.[4]

In *Faragher*, the court went on to narrowly interpret the third basis for indirect liability:

> [I]n one sense, a supervisor is always aided in accomplishing hostile environment sexual harassment by the existence of an agency relationship with his employer because his responsibilities include close proximity to and regular contact with the victim. *Gary v. Long*, 313 U.S. App. D.C. 403, 59 F.3d 1391, 1397 (D.C. Cir.), *cert. denied*, ___ U.S. ___, 116 S. Ct. 569 133 L. Ed. 493 (1995). However, the common law rule does not use "aided" in such a broad sense. Rather, the employer is liable only if the harassment is accomplished by an instrumentality of the agency or through conduct associated with the agency status. *Id.* [footnote omitted].

Faragher, 111 F.3d at 1537. Reynolds respectfully submits that the Eleventh Circuit's determination in this regard is in error, and in direct conflict with decisions from other Circuit Courts of Appeal. As the Eleventh Circuit itself pointed out in *Faragher*:

> Subsequent to *Meritor*, the circuits differ on the appropriate test to apply in a hostile work environment case involving sexual harassment of an employee by the employer's supervisor. *See, e.g., Kauffman v. Allied Signal*, 970 F.2d 178, 184 (6th Cir. 1992) (holding that the plaintiff must establish that a supervisor's harassment was within the scope of his employment and that the employer failed to respond adequately and

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[4] Petition for writ of certiorari pending.

effectively when it learned of the harassment); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104, 106-07 (4th Cir. 1989), *vacated in part*, 900 F.2d 27 (4th Cir. 1990) (holding that the proper inquiry is whether the individual defendant served in a supervisory position in which he exercised "significant control over the plaintiff's hiring, firing, or conditions of employment;" and, if not, whether employer had actual or constructive knowledge of the existence of a hostile work environment and took no prompt and adequate remedial steps); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418 (10th Cir. 1987) (holding that employer liability could arise under the principles of Restatement § 219(2) if: (1) the employer was negligent or reckless; or (2) the employee relied on the supervisor's apparent authority; or (3) the supervisor was aided in his harassment by the existence of the agency relationship); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (holding that the plaintiff must prove that management level employees had actual or constructive knowledge about the existence of a sexually hostile environment and failed to take prompt and adequate remedial action); and *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (holding that "employers are liable for failing to remedy or prevent a hostile or offensive work environment of which management-level employees knew, or in the exercise of reasonable care should have known").

Faragher, 111 F.3d at 1535. Subsequent to *Faragher*, two other circuits have rendered decisions in conflict with *Faragher*, and a third was unable to reach a consensus on the proper standard for determining employer liability for hostile environments created by a supervisor.

On May 8, 1997, the Tenth Circuit rendered its decision in *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997).[5] In that decision, the Tenth Circuit criticized the *Gary* case, upon which the en banc majority in *Faragher* relied. In that regard, the *Harrison* court held that the proper application of agency principles to hostile environments created by supervisors is the more expansive view set out in *Karibian v. Columbia University*, 14 F.3d 773, 780 (2d Cir.), *cert. denied*, 512 U.S. 1213 (1994) ("an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship . . . "). *Harrison*, 112 F.3d at 1445-46. In accordance with the *Karibian* decision (which also conflicts with the Eleventh Circuit's *Faragher* decision), the *Harrison* court applied a different analysis to § 219 of the Restatement of Agency than did the en banc majority in *Faragher*, or the Court of Appeals for the District of Columbia Circuit in *Gary*. *See*, *Harrison*, 112 F.3d at 1446.

Shortly after the Tenth Circuit's decision in *Harrison*, on June 3, 1997, the Second Circuit rendered its decision in *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997),[6] which also conflicts with the Eleventh Circuit's decision in *Faragher*. The *Torres* decision is in line with the Tenth Circuit's decision in *Harrison*, as well as the Second Circuit's prior decision in *Karibian*:

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[5] Petition for writ of certiorari pending.

[6] Petition for writ of certiorari pending.

> To recap, an employer will be held liable for the harassment perpetrated by one of its supervisors if:
>
> * * *
>
> b) the supervisor used his actual or apparent authority to further the harassment or was otherwise aided in accomplishing the harassment by the existence of the agency relationship, . . .

Torres, 116 F.3d at 625.

Even more recently, the Seventh Circuit has addressed this issue en banc, in the consolidated cases of *Jansen v. Packaging Corporation of America* and *Ellerth v. Burlington Industries, Inc.*, 1997 U.S. App. LEXIS 22266 (7th Cir. 1997), decided August 12, 1997. In a decision punctuated by eight separate opinions, the Seventh Circuit acknowledged its inability to resolve this important issue. Indeed, writing per curiam, the Seventh Circuit indirectly asked for this Court's guiding hand, to make sense of the confusion which now befuddles this area of the law:

> The court's inability to forge a majority position with regard to the proper standard for evaluating an employer's liability for sexual harassment by a supervisory employee means that panels of the court that have similar cases in the future, and the district judges of this circuit on remand in these cases and in similar future cases, will have to determine and be guided by the narrowest grounds for the decisions in these two cases. Perhaps in some future case this court will be able to forge a majority position; *perhaps the Supreme Court will bring order to the chaotic caselaw in this important field of practice.* In the meantime, it is important for the district courts of this circuit to recognize in this welter

> of opinions that certain views do command a majority within our court: in particular, that the standard for employer liability in cases of hostile-environment sexual harassment by a supervisory employee is negligence, not strict liability, and that liability for quid pro quo harassment is strict even if the supervisor's threat does not result in a company act. These principles will bind the panels of this court and the district courts of this circuit *until the Supreme Court resolves the issues.*

Jansen and *Ellerth*, at *10-11 (emphasis added).[7]

In the case at bar, the Eleventh Circuit should have affirmed the jury's finding that CSXT was liable for the sexual harassment inflicted upon Ms. Reynolds by Widney, because Widney was aided in accomplishing the harassment by the existence of the agency relationship between CSXT and himself. *Torres*, 116 F.3d at 625; *Harrison*, 112 F.3d at 1446 (employer liable for sexual harassment committed by one of its supervisors when the employer delegated the authority to the supervisor to control the plaintiff's work environment and the supervisor abused that delegated authority by using that authority to aid or facilitate his perpetration of the harassment); *Karibian*, 14 F.3d at 780 ("an employer is liable for the discriminatorily abusive work environment created by a supervisor if the supervisor uses his actual or apparent authority to further the harassment, or if he was otherwise aided in accomplishing the harassment by the existence of the agency relationship"). This is especially true where, as noted by the Eleventh Circuit in the

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[7] The *Ellerth* case is currently on writ of certiorari to this Court.

instant case, the supervisor uses threats to condition the plaintiff's future employment upon submission to inappropriate sexual conduct, and the supervisor uses authority delegated to him by the employer to terminate the victim of his harassment, in retaliation for her complaints about his unlawful conduct.[8] Accordingly, the conflict among the circuit courts of appeals requires this Court's intervention through the grant of the writ to the Eleventh Circuit.

II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS CONCERNING THE PROPER STANDARD FOR DETERMINING EMPLOYER LIABILITY FOR PUNITIVE DAMAGES BASED UPON A MALICIOUS OR RECKLESS ACT BY ITS SUPERVISORY EMPLOYEE.

In the instant case, the Eleventh Circuit determined that Reynolds presented sufficient evidence to establish that she was the victim of a retaliatory discharge in April of 1992. *Reynolds*, 115 F.3d 860, ___ (11th Cir. 1997). The Eleventh Circuit also acknowledged that Widney was the individual responsible for having Ms. Reynolds discharged. *Id.* Likewise, the Eleventh Circuit noted that CSXT has never contended that Reynolds failed to offer

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[8] Though the Eleventh Circuit in *Reynolds* acknowledged that Widney threatened Ms. Reynolds and the other temporary employees' jobs if they complained about his sexually inappropriate conduct, and acknowledged that Reynolds was fired by Widney in retaliation for reporting his sexually inappropriate conduct, the Eleventh Circuit failed to address the issue of whether this conduct provided a basis for holding CSXT indirectly liable for Mr. Widney's sexual harassment. *See, Reynolds*, 115 F.3d 860, ___ (11th Cir. 1997).

sufficient evidence that the retaliatory acts were condoned or directed by CSXT through higher management. *Reynolds*, 115 F.3d 860, ___ n.11. Finally, the Eleventh Circuit determined that Widney's acts plausibly could be deemed malicious or reckless. *Reynolds*, 115 F.3d 860, ___. Despite these findings, however, the Eleventh Circuit held that there was insufficient evidence to hold CSXT liable for the punitive damages assessed by the jury, because Reynolds could not show that higher management "countenanced or approved Widney's behavior." *Reynolds*, 115 F.3d 860, ___. The Eleventh Circuit's determination in this regard, however, conflicts with the decisions of the Seventh, Eighth and D.C. Circuit Courts of Appeals.

The Eleventh Circuit based its reversal of Reynolds' punitive damage award, on her retaliation claim, upon its intervening decision in *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996).[9] In *Splunge*, the Eleventh Circuit determined that although Shoney's was liable for a sexually hostile environment, that liability was based upon only a constructive notice theory. *Splunge*, 97 F.3d at 490. In other words, Shoney's liability for the acts of its supervisors was based upon a mere negligence theory, rather than upon any malicious or reckless conduct by upper management. As a result, the Eleventh Circuit vacated the punitive damage award against Shoney's, holding that mere constructive knowledge does not satisfy the requirement of the Civil Rights Act of 1991, that the

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[9] Neither party in *Splunge* filed a petition for writ of certiorari to this Court following the Eleventh Circuit's October 10, 1996 decision in that case.

Defendant's actions be malicious or with reckless indifference to the plaintiff's federal rights. *Id.*, at 490-91. Accordingly, even though there was evidence that the harassing supervisors acted maliciously or recklessly, the Eleventh Circuit ruled that the state of mind of the harassing supervisors was not equivalent to the state of mind of the employer, for punitive damages purposes. *Id.*, at 491.

The Eleventh Circuit's holding in *Splunge*, as applied to the facts of *that* case, is consistent with the standards for punitive damages under § 1981a. In that case, it would have been inappropriate to allow punitive damages because the hostile environment was unknown to higher management *and was in no way dependent upon any authority delegated by the employer. See, Kolstad v. American Dental Association*, 108 F.3d 1431, 1438-39 (D.C. Cir. 1997) (holding that in certain cases, the challenged employment practice may technically amount to intentional discrimination but involve only "negligence" (*i.e.*, ignorance) on the part of upper management, concerning the existence of a federally protected right, so that punitive damages would be inappropriate in such a case).[10] However, this limiting rationale has no application in the retaliation/termination situation found in *Reynolds* – where the supervisor's malicious act of termination necessarily included authority delegated to him by his employer. In such a case, the employer is "indirectly" liable for the supervisor's malicious conduct, so that punitive damages against the

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[10] On May 28, 1997, rehearing en banc was granted in the *Kolstad* case. The case was argued before the en banc District of Columbia Circuit on September 22, 1997. A ruling on rehearing has not yet been made.

employer are appropriate. Despite this fact, the Eleventh Circuit improperly extended its holding in *Splunge* (hostile environment by supervisors; no knowledge by upper management; no use of delegated authority) to the instant case (retaliatory termination by supervisor, acting with express authority of higher management and despite higher management's actual awareness of potential retaliatory motive), thereby erroneously disallowing punitive damages in this case, even though the jury found the supervisor's misconduct was malicious or reckless, and was expressly approved by higher management.[11] Such an extension of *Splunge* is in direct conflict with the decisions of the Seventh, Eighth and D. C. Circuit Courts of Appeals, thus requiring this Court's intervention.

In *Kolstad*, the D. C. Circuit reversed the district court's decision which had refused to allow the jury to consider an award of punitive damages in a Title VII case of failure to promote, based upon the plaintiff's sex. *Kolstad*, 108 F.3d at 1434. The D.C. Circuit held that once the plaintiff presents evidence of intentional discrimination, sufficient to establish liability under Title VII, it is within the discretion of the jury to determine whether that intentional misconduct merits a punitive damage award:

> As both the Supreme Court and this court have explained, "evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the jury to award

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[11] The Eleventh Circuit based its holding in *Reynolds* on *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 767, 136 L.Ed.2d 713 (1997) and *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995).

> punitive damages, provided that the jury, in its 'discretionary moral judgment,' finds that the conduct merits a punitive award." *Barbour*, 48 F.3d at 1277 (emphasis added) (citations omitted)[12] (quoting *Wade*, 461 U.S. at 52).[13] In such cases, "no additional evidence is required," *id.*, because "the state of mind necessary to trigger liability for the wrong is at least as culpable as that required to make punitive damages applicable." *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 205 (1st Cir. 1987). Having concluded that the jury could reasonably find from the evidence that ADA [the defendant] intentionally discriminated against Kolstad, the district court should have instructed the jury that upon the requisite finding – malice or reckless indifference to Kolstad's rights – it could consider a punitive award. The evidentiary threshold having been reached, discretion to award punitive damages, within the limits set by statute, lay with a properly instructed jury, not the court.

Kolstad, 108 F.3d at 1438 (emphasis in original) [bracketed language added].

The Seventh Circuit recently has upheld a punitive damage award upon the same basis. In its decision, the Seventh Circuit stated:

> Family Dollar argues that the district court committed error in awarding punitive damages, because Blizzard, Family Dollar's district manager, failed to present direct evidence that he was aware of the fact that he was violating Merriweather's civil rights when he discharged

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[12] *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 805, *cert. dismissed*, 116 S. Ct. 1037 (1996).

[13] *Smith v. Wade*, 461 U.S. 30, 75 L.Ed.2d 632, 103 S. Ct. 1625 (1983).

> her. We disagree. "Evidence that suffices to establish an intentional violation of protected civil rights also may suffice to permit the [fact finder] to award punitive damages, provided the [court], in its discretionary moral judgment, finds that the conduct merits a punitive award. No additional evidence [of reckless indifference] is needed.
>
> * * *
>
> The purpose of the punitive damages, the court stated, was to punish Family Dollar and deter others from similar misconduct – *especially with a violation like retaliation, which is easy to conceal and difficult to prove." That is precisely the sort of judgment peculiarly within the province of the finder of fact, and we will not disturb it on appeal.*

Merriweather v. Family Dollar Stores of Indiana, Inc., 103 F.3d 576, 581-82 (7th Cir. 1996) (emphasis added, citations and footnote omitted) [bracketed language in original].

Likewise, the Eighth Circuit has recently addressed this issue, suggesting that where the alleged discrimination is shown to be intentional, that conduct could be sufficient to impose punitive damages upon the defendant:

> We need not decide whether recovery of punitive damages under Title VII requires a "heightened" showing beyond intentional discrimination (that is intentional discrimination based on disparate treatment as opposed to disparate impact), although the author would suggest that it does not.

Kim v. Nash Finch Company, 1997 U.S. App. LEXIS 22511, *54 n.5 (8th Cir. 1997) (citations omitted).[14] Under the

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[14] Neither party in *Kim* has filed a petition for writ of certiorari to this Court.

rationale of the District of Columbia, Seventh and Eighth Circuits, Reynolds' punitive damage award against CSXT would stand.

In *Reynolds*, the Eleventh Circuit acknowledged that: Widney initiated the retaliatory discharge of Reynolds; Widney received the approval of upper management for the retaliatory discharge of Reynolds; upper management expressly considered and discussed Widney's possible retaliatory motive, but made no effort to investigate it; and Widney then carried out the retaliatory discharge of Reynolds. Despite these facts, the Eleventh Circuit held that CSXT could not be liable for punitive damages because higher management had not acted with the requisite maliciousness or reckless indifference. *Reynolds*, 115 F.3d 860, ___.

The better reasoning is that advanced by the Seventh, Eighth and D. C. Circuits which would have held, under the facts here, that it was for the jury to decide whether punitive damages should be imposed against CSXT, on account of the retaliatory discharge of Ms. Reynolds. The Eleventh Circuit's reasoning, on the other hand, has the no doubt unintended and undesirable effect of creating a loophole for employers. Under the rationale of *Reynolds*, an employer can insulate itself from liability for punitive damages by delegating to lower management the authority to carry out hiring and firing decisions – absent an express finding that the employer specifically delegated such authority for a malicious or reckless reason. *See, Protectus Alpha Navigation Co., LTD. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1386 (9th Cir. 1985) ("[i]t seems obvious that no corporate executive or director would approve the egregious acts to which punitive damages would attach and, therefore, no recovery for more

than compensatory damages can ever be had against a corporation if express authorization or ratification were always required. As we have already noted, most courts have rejected the corporate authorization or ratification standard"). This Court should correct the loophole created by the Eleventh Circuit.

To summarize, in the instant case the Eleventh Circuit erroneously extended its rationale in *Splunge* to the facts of *Reynolds*. The anomalous result is that, in some cases, an employer cannot be held liable for punitive damages even where its supervisor acts maliciously in terminating an employee, in retaliation for her complaints of his unlawful discrimination – even though the supervisor uses the authority delegated to him by his employer, and does so with the express knowledge of upper management that the termination may be retaliatory in nature! *Reynolds*, 115 F.3d 880, ___. The Eleventh Circuit's holding is in line with the prior holdings of the Fifth and Tenth Circuits in *Patterson*, 90 F.3d at 943 (5th Cir. 1996) and *Fitzgerald*, 68 F.3d at 1263 (10th Cir. 1995). However, these decisions conflict with the recent, and better reasoned, decisions of the District of Columbia, Seventh, and Eighth Circuits. *See, Kolstad*, 108 F.3d 1431 (D.C. Cir. 1997); *Merriweather*, 103 F.3d 576 (7th Cir. 1996) and *Kim*, 1997 U.S. App. LEXIS 22511 (8th Cir. 1997). The conflict among these two lines of authority, *Reynolds/Patterson/Fitzgerald* on the one hand, and *Kolstad/Merriweather/Kim* on the other, requires this Court's intervention through the grant of the writ to the Eleventh Circuit to achieve uniformity amongst the circuits.

III. CERTIORARI SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT'S CLEARLY ERRONEOUS FACTUAL FINDINGS CAUSED THAT COURT TO MISTAKENLY CONCLUDE THAT THERE WAS INSUFFICIENT EVIDENCE OF: (1) SEXUALLY HOSTILE ENVIRONMENT, AND (2) A CAUSAL LINK BETWEEN PLAINTIFF'S COMPLAINTS OF DISCRIMINATION IN MARCH, MAY AND SEPTEMBER 1992, ON THE ONE HAND, AND THE ELIMINATION OF HER POSITION IN FEBRUARY 1993, ON THE OTHER.

A. Sexual Harassment/Hostile Environment.

In its Opinion, the Eleventh Circuit rejected Reynolds' argument that, prior to her arrival at CSXT, the company, through Linda Elson, actually knew of a hostile environment in the Medical Records file room. The Court's ruling hinges on the following finding:

> We reject this argument since Reynolds presented no evidence to show that Elson was considered higher management within CSXT, *or that Elson had a duty to report to higher management an off-hand third-person remark.*

Reynolds, 115 F.3d at ___ (emphasis added). While it is true that Reynolds presented no evidence that Elson had a duty to report to higher management "an off-hand third-person remark," Reynolds did present evidence that Elson had a duty to report "complaints" of sexual harassment to higher management and that, in fact, Elson had knowledge of such complaints concerning Roger Widney, shortly before Reynolds began working at CSXT.

While being questioned *at trial* by Reynolds' counsel, Ms. Elson gave the following testimony:

> Q. If a complaint were brought to your attention in 1991 from a clerk in the Medical Records file room that you construed as a complaint of sexual harassment, did you

have an obligation at that point to report that to higher management?

A. Yes. If a complaint had been made.

Q. Even if the folks making the complaint were from the Medical Records file room?

A. I would think anyone that made the complaint.

The jury then heard evidence, via impeachment by her prior testimony, that Ms. Elson did, in fact, have knowledge of prior "complaints" against Widney, concerning either racial or sexual comments made by him. Although Ms. Elson attempted – *in the courtroom* – to characterize the complaints as "hearsay or gossip," she was impeached by her prior deposition testimony, as follows:

Q. During the time that Mr. Widney was the supervisor in the file room, did you ever hear of any *complaints* made against him, whether they were true or not? But did you hear of any *complaints* made against him accusing him of making either racial or sexual-based comments?

THE COURT: Go ahead.

MR. FORTUNE: Answer: Yes.

Despite Elson's admitted obligation to report such complaints to higher management, and despite her reluctant acknowledgment at trial that she herself construed the information about Widney as "complaints," she never reported them to anyone else in the company. Given that the jury, as well as the trial judge, had the opportunity to observe Ms. Elson's demeanor, and evasive responses, on this very important issue, and in view of the fact that the Eleventh Circuit should have viewed this evidence in the light most favorable to the non-movant, Ms. Reynolds presented sufficient evidence to support the jury's finding that CSXT actually knew of a sexually hostile environment prior to Reynolds' arrival. Accordingly,

Reynolds' sexual harassment claim against CSXT was erroneously vacated by the Eleventh Circuit.

B. Retaliation/Reynolds' Second Discharge.

The Eleventh Circuit reversed the jury's express finding that the February 1993 termination of Arlene Reynolds' employment with CSXT was in retaliation for her earlier complaints of sexual harassment. The Eleventh Circuit found:

> She [Reynolds] presented no evidence from which a reasonable juror could infer that CSXT's replacement of all its Medical Records room temporaries with permanent CSXT employees in February, 1993, was related to her March and September, 1992, complaints.[15]

Reynolds, 115 F.3d at ___ [bracketed language added].

Ms. Reynolds respectfully submits that the Eleventh Circuit's summary dismissal of the jury's finding on this issue overlooks the following significant evidence, none of which is cited or alluded to in the Eleventh Circuit's Opinion:

1. CSXT received a copy of Arlene Reynolds' EEOC charge of sexual discrimination on September 22, 1992. Less than three months later, on December 7, 1992, CSXT issued its "Position Paper, Utilization Of Temporary Staffing Services at CSX Transportation." Among other things, the "Position Paper" recommended the replacement of only four "temporary" employees supporting the Medical

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[15] The record actually shows that Reynolds complained in March, *May*, and September 1992. In its opinion, the Eleventh Circuit apparently "rejected" Ms. Reynolds' disputed testimony concerning her May 1992 complaints of discrimination, although the jury apparently accepted the testimony, as evidenced by its verdict.

Department, including Ms. Reynolds, with four contract clerical positions.

2. The "Position Paper" was authored by James Duguid, Director of Administrative Services. Asked when he began the data gathering necessary to prepare the December 7, 1992, "Position Paper," Duguid testified that it was in late September "at the earliest."

3. Importantly, of all the different departments within which temporary employees were being used company-wide at CSXT, the "Position Paper" recommended "replacing" only those temporary employees within the Medical Department, where Ms. Reynolds worked. Even more damning, only four of the seven temporary employees within that single department were "replaced," including the Plaintiff.

4. Notably, the "Position Paper" recommended that the four temporary employees in the Medical Records file room be replaced with "four contract [union] clerical positions." However, the evidence at trial was that neither Ms. Reynolds, nor any of the other three temporary employees affected by the "Position Paper," was actually replaced by contract, or union employees.

5. Perhaps the single most important erroneous factual finding by the Eleventh Circuit was that:

> Hamilton further testified that CSXT planned to relocate the temporary staffers to the real estate area, which was in need of more workers for a particular project.

Reynolds, 115 F.3d at ___. This finding by the Court is a misstatement of the evidence. Ms. Hamilton simply did not testify that there was any plan to relocate Ms. Reynolds, or any of the other three temporary employees dismissed from the Medical Records file room, to the real estate area, or any other area within CSXT.

From the foregoing evidence, a reasonable jury could have concluded that CSXT began gathering data for the "Position Paper" as a pretextual basis for terminating Reynolds, and the other temporary workers who complained or otherwise supported her complaints, in late September or October 1992; and that the decision to eliminate their positions was in retaliation for Reynolds' EEOC charge of sexual discrimination, which was received by CSXT on September 22, 1992. Again, the Eleventh Circuit should have viewed this evidence in the light most favorable to the non-movant, namely Reynolds. Unfortunately, the Eleventh Circuit did not do so, but instead completely ignored or mischaracterized the evidence supporting Reynolds' second retaliation claim. As a result, Reynolds' second retaliation claim against CSXT was erroneously vacated by the Eleventh Circuit.

CONCLUSION

Based on the authorities cited and the arguments presented, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Arlene REYNOLDS, Plaintiff-Appellee, Cross-Appellant,

v.

CSX TRANSPORTATION, INC., A Virginia Corporation, Defendant-Appellee, Cross-Appellee,

Roger Widney, A Supervisory Employee of CSX Transportation, Inc., Defendant.

No. 95-3364.

United States Court of Appeals,
Eleventh Circuit

June 20, 1997.

Employee of temporary agency sued agency client for hostile environment sexual harassment and retaliation under Title VII and § 1981. The United States District Court for the Middle District of Florida, No. 93-1316-CIV-J-20, William Terrell Hodges, J., denied employer's motions for judgment as a matter of law and new trial and entered judgment in favor of employee. Employer appealed. The Court of Appeals held that: (1) employee failed to show that employer knew or should have known of harassing environment; (2) employer took prompt action reasonably likely to prevent misconduct from recurring; but (3) whether employee's complaints of harassment and her temporary replacement were causally connected was for jury.

Affirmed in part, reversed and rendered in part, and vacated in part.

Appeals from the United States District Court for the Middle District of Florida.

Before COX, Circuit Judge, KRAVITCH, Senior Circuit Judge, and STAGG*, Senior District Judge.

PER CURIAM:

Arlene Reynolds sued CSX Transportation, Inc. ("CSXT"), alleging claims of hostile environment sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1994); and hostile environment racial harassment and retaliation under 42 U.S.C. § 1981 (1994). The district court denied CSXT's motions for judgment as a matter of law and new trial. CSXT now appeals. We affirm in part, reverse in part, and vacate the judgment in part.

I. *BACKGROUND*

CSXT is a corporation with an office building in downtown Jacksonville, Florida. In a second floor room of that building, CSXT houses approximately 50,000 employee medical records containing sensitive information. From 1988 to 1993, CSXT used non-union temporary staffers to maintain those records. CSXT preferred such staffers over union-represented employees in part because of confidentiality concerns[1] and in part because of a freeze on promoting union-represented employees

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* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

[1] Dr. Joseph Thomasino, CSXT's Chief Medical Officer, testified that a breach of confidentiality would more likely occur if union-represented employees maintained the files since those employees frequently moved in and out of job positions.

and putting them into entry-level staff jobs such as those available in the medical records room. Olsten Temporary Services ("Olsten Temporary") provided CSXT with at least some of the temporary staffers. Appellant Reynolds, Victoria Allen, and Darlene Turner, three black females, and Mindy Jennings, a white female, were among the staffers assigned to work in the medical records room.

Events That Occurred Prior to Reynolds's Arrival

Prior to 1992, Mike Rist, a white male and permanent CSXT employee, supervised the temporary staffers. Rist was replaced, however, in part because Jennings complained that Rist asked her to lunch under circumstances that she perceived as offensive. CSXT initially moved Rist to a file room located on the same floor as the medical records room, but later moved him to another floor. Susan Hamilton, the Assistant Vice President of Administrative Services, testified that this later move was due entirely to CSXT's decision to "stage him so that he could pull back on his union seniority." Jennings testified that the later move followed her expression of discomfort upon seeing Rist since her complaint was part of the reason for his demotion. Rist's replacement was Roger Widney, another white male and permanent CSXT employee. Widney reported to Les Backherms, the Manager of Administrative Services, who reported to Jim Duguid, the Director of Administrative Services.

After Widney began supervising the medical records room, Linda Elson, a manager in a different department, heard from a third person that Widney stated to Turner that her husband "must have left it in too long" in

response to Turner's announcement that she was pregnant. Although Elson testified that she would have felt obligated to report any sexual harassment complaint to appropriate management employees, she did not investigate whether Widney actually made the statement since she considered the third person report "gossip."

Events That Occurred Subsequent to Reynolds's Arrival

Olsten Temporary assigned Reynolds to CSXT in February, 1992. Reynolds worked in CSXT's medical records room with the other temporary staffers – Allen, Turner, and Jennings – and with Widney.

Within four or five weeks of her arrival at CSXT, Reynolds observed, or was subjected to, six instances of inappropriate behavior by Widney. On one occasion, Widney passed by her in a narrow shelving aisle and stated that they were stuck together "like magnets" when his front side touched her back side for a couple of seconds. Reynolds testified that she could feel his erection during the encounter. On another occasion, Widney looked at Reynolds and exclaimed that "there's [sic] other things that you can do on the top of a pool table" in response to Jennings's remark that her husband had stayed out all night with the excuse of playing pool. Reynolds testified that she interpreted Widney's exclamation as a suggestion that she engage in sexual intercourse with him. On another occasion, when Reynolds and Turner were looking for jobs in a newspaper, Widney stated that he had a job for them at a nude cafe in St. Augustine, and that he would go watch them there. When Reynolds asked Widney what his wife would think,

Widney laughed. On another occasion, Reynolds overheard Widney ask Allen whether a certain swimsuit manufacturer made swimsuits large enough to fit Allen. Finally, on another occasion, Widney massaged Reynolds's shoulders, as he had the other temporary staffers. According to Widney, he did this in an effort to make them "feel good" about working there. Widney further testified that over his roughly 35-year tenure at CSXT, he had seen other CSXT male employees massaging their female subordinates' shoulders, in a manner expressing "compassion" for the stress they suffered.

Reynolds testified that she did not immediately complain about Widney's behavior. Although CSXT's antiharassment policy was posted on bulletin boards located on all floors, she testified that she was not personally advised of those policies since she was a temporary staffer. She also testified that certain comments made by Widney gave her the impression that a complaint would be ineffectual. Reynolds testified that, for example, Widney would say "what goes on in the file room stays in the file room" and that if any complaints were made to his superiors, the superiors would back him up. Widney also stated from time to time something to the effect of "the first to complain will be the first to go."

Reynolds's Initial Complaint & CSXT's Response

Nonetheless, Reynolds did complain following an event which occurred in late March, 1992, about five weeks after she had arrived at CSXT. On that occasion, Widney approached Reynolds while she was kneeling down pulling files from a bottom shelf. As he neared, he

asked Reynolds if she thought she was "down far enough," to which Reynolds replied, "as far as I can go." Thinking that perhaps Widney wanted to pass her in the shelving aisle, Reynolds then turned and sat on a step stool located next to her. When Widney's crotch was at the same level as Reynolds's face, Widney laughed and stated, "I'd better stop before someone come [sic] in and thinks something." Reynolds completed the task she was doing, then reported the event to Jay Jackson, an African Methodist Episcopal minister and a CSXT claims administrator who worked down the hall. Reynolds testified that Jackson took her complaint seriously and told her that he knew someone who could look into it.

Almost immediately, Jackson referred the complaint to Greg Lunn, an assistant manager in the Employee Relations Department. On the same day, Lunn met confidentially with Reynolds, Allen, and Turner and told them that he would refer the complaint to someone who would investigate it. Lunn then prepared a memorandum of the matter and submitted it to Elaine Tisdale, CSXT's Employee Relations Department Senior Director and the person in charge of investigating such matters. Within a few days of receiving the memorandum, Tisdale interviewed the temporary staffers individually. During Reynolds's interview, Reynolds reported several of the instances of inappropriate behavior by Widney. Tisdale asked each staffer how she could help, and the staffers told her that they wanted the behavior to stop. Per direction given by Hamilton, CSXT gave Widney a verbal warning, ordered him to attend sensitivity training, took away his supervisory duties, and ordered his transfer from the medical records room to the general claims file

room, a place where he could work alone. That room was located on the second floor, down the hall from the medical records room. CSXT replaced Widney with Lana Brantley, a white female and permanent CSXT employee who Reynolds described as being "very nice" and "a good supervisor."

Reynolds's Initial Replacement

During a time when Widney was training Brantley for her new position, a doctor from CSXT's Medical Department confronted Widney about a filing error. Widney testified that he believed Reynolds was to blame for the error. Prior to taking any action, he consulted Backherms about what to do. Backherms in turn discussed the matter with Duguid. After the three discussed the matter, Widney called Olsten Temporary and told it about the error. Olsten Temporary immediately replaced Reynolds with a different temporary staffer. Widney, Backherms, and Duguid all testified that at that time they did not know that Reynolds was the staffer who initially complained about Widney. However, Reynolds testified that when she went back to CSXT to collect her personal effects, she overheard Widney state to Jennings, "let me see if she's going to run upstairs on sexual harassment now."

Reynolds's Return to CSXT

Tisdale learned about Reynolds's replacement within days, and immediately left a message on Reynolds's answering machine telling her that she would get Reynolds her job back. Tisdale then met with Hamilton.

Hamilton testified that she wanted Reynolds to come back because she was concerned about the appearance of impropriety that could be created by Reynolds's replacement. Within a few days, Olsten Temporary contacted Reynolds and told her that she could go back to CSXT if she wanted to. Reynolds accepted. She returned to CSXT after having missed less than one week of work. Because of Widney's part in having Reynolds replaced, Hamilton prepared a written reprimand for his personnel file and fined him five percent of his pay for six months. She also reprimanded Backherms and Duguid.

Reynolds testified that after she returned, Widney never again said anything to her or touched her inappropriately. However, she testified that he would look into the medical records room and stare at her while Brantley was there, would whistle in an irritating manner, and would bump into her while passing by her in the narrow aisles without excusing himself. On the first day of her direct examination, Reynolds testified that she reported this behavior to Tisdale on at least one occasion, but she could not remember exactly when she made such a report. Following an overnight recess, Reynolds returned to the stand and testified that she knew definitively that she told Tisdale about the behavior on two occasions, the first occasion being around May 14, 1994, very soon after her return, and the second occasion being around September, 1994, soon after she filed a charge against CSXT with the Jacksonville Equal Opportunity Commission ("JEOC"). This testimony contradicted her earlier deposition testimony and Tisdale's testimony, both of which reflected that Reynolds told Tisdale about the behavior only once and only after she

filed the JEOC charge. In any event, it is undisputed that CSXT took no further action against Widney until after Reynolds filed the JEOC charge.

Reynolds's First JEOC Charge & CSXT's Second Investigation

The JEOC charge specifically alleged that Widney continued to engage in inappropriate conduct. Tisdale testified that the charge prompted her to again investigate possible inappropriate behavior by Widney. As a result of the investigation, CSXT transferred Widney to a different floor, where a position had just become available. Hamilton testified that she felt that the move would eliminate any remaining awkwardness between the temporary staffers and Widney. Hamilton also testified that the investigation revealed that Olsten Temporary never paid Reynolds for the days she missed because of her replacement. CSXT therefore paid her for those days.

Reynolds's Second Replacement

Reynolds continued to work for CSXT until February, 1993, at which time CSXT replaced its medical records room non-union temporary staffers with CSXT permanent employees. According to Hamilton, this replacement was due in part to the fact that the replacement employees would otherwise lose their jobs or be furloughed and in part to the fact that the union was upset with CSXT's use of temporary staffers over CSXT permanent employees. Two of the replacement employees were white and two were black. Hamilton further testified that CSXT planned to relocate the temporary staffers to the

real estate area, which was in need of more workers for a particular project.

Reynolds's Second JEOC Charge & Complaint

Within three weeks of leaving CSXT, Olsten Temporary assigned Reynolds to a position at an insurance company. Reynolds liked working there, in part because she had overtime compensation opportunities which she did not have at CSXT. While there, Reynolds filed a second charge against CSXT with the JEOC, this time alleging that CSXT retaliated against her because of the first JEOC charge. The JEOC gave Reynolds a "right to sue" letter, and Reynolds filed the complaint involved in this case. In the complaint, she asserted hostile environment sexual harassment and retaliation claims under Title VII. She later amended the complaint to add hostile environment racial harassment and retaliation claims under § 1981.[2]

Reynolds's Hostile Environment Racial Harassment Claim

To support the hostile environment racial harassment claim at trial, Reynolds presented evidence that Widney made statements with racial undertones outside of her presence, but during her tenure at CSXT. For example, he used the words "salt and pepper" to refer to the white and black temporary staffers, and adopted the phrase "back of the bus" from Allen to refer to the location where Allen sat in the file room. Additionally, Widney testified that he felt more free to make comments with

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[2] Reynolds also asserted claims against Widney. Those claims are not at issue in this appeal.

sexual innuendos around the temporary staffers, both white and black, since he saw them looking at a particular swimsuit catalog during work. However, he testified that he did not feel free to make the same comments around Brantley, the white female supervisor, even though she also looked at the catalog during work. According to Widney, he had known Brantley for a significant number of years and knew she was a "decent" woman. Reynolds also presented evidence that Widney stopped massaging the shoulders of Jennings, the white temporary staffer, upon her objection, but did not stop massaging the black staffers' shoulders upon their similar objections. Widney testified that if those women had objected, their objections had "gone over his head."

The Trial

After Reynolds's presentation of evidence and at the close of all evidence, CSXT moved for judgment as a matter of law under Federal Rule of Civil Procedure 50(a). It argued that Reynolds had offered insufficient evidence to support her hostile environment, retaliation, and punitive damages claims. The district court denied the motion in all respects and submitted the case to the jury on special interrogatories. The jury found that (1) Reynolds was CSXT's employee and could recover on the statutory claims; (2) Reynolds was subject to a sexually and racially hostile working environment; (3) CSXT knew or should have known of the harassment and failed to take prompt remedial action; and (4) Reynolds suffered retaliation in both 1992 and 1993 for asserting harassment claims. It awarded her $900 for lost wages due to retaliation, $600 for mental pain and suffering due to retaliation

and a hostile environment, $167,000 in punitive damages for hostile environment sexual harassment, $167,000 in punitive damages for hostile environment racial harassment, and $166,000 in punitive damages for retaliation. The district court *sua sponte* reduced the total award to $300,000, finding in part that the punitive damages award was excessive. CSXT then moved for a new trial, and renewed its motions for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). The district court denied the motions and CSXT filed a notice of appeal.

II. *STANDARD OF REVIEW*

We review de novo a district court's denial of a motion for judgment as a matter of law, applying the same standards as the district court. *See Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*, 97 F.3d 436, 439 (11th Cir.1996). Under those standards, we must view the evidence in the light most favorable to the nonmovant, and will reverse if "there is no legally sufficient evidentiary basis for a reasonable jury to find" for the nonmovant. FED.R.CIV.P. 50(a); *see Equitable Life Assur. Soc'y of the United States v. Studenic*, 77 F.3d 412, 415 (11th Cir.1996). A " 'mere scintilla of evidence' " is not legally sufficient. *Walker v. NationsBank of Florida N.A.*, 53 F.3d 1548, 1555 (11th Cir.1995) (quoting *Verbraeken v. Westinghouse Electric Corp.*, 881 F.2d 1041, 1045 (11th Cir.1989)). We review the denial of a motion for a new trial for abuse of discretion. *Wood v. Morbark Indus., Inc.*, 70 F.3d 1201, 1206 (11th Cir.1995).

III. *ISSUES*

CSXT raises a number of issues, three of which we address below: (1) whether Reynolds presented legally sufficient evidence to show that CSXT knew or should have known of harassment and failed to take prompt remedial action; (2) whether Reynolds presented legally sufficient evidence to show that CSXT took adverse employment action against her in retaliation for her harassment complaints; and (3) whether Reynolds presented legally sufficient evidence to show that CSXT acted with the malice or recklessness required to justify a punitive damages award.[3]

IV. *DISCUSSION*

A. *Hostile Environment Claims*

To hold an employer directly liable[4] under either Title VII or § 1981 for a hostile environment created by a harassing supervisor, an employee must prove that the employer knew or should have known of the harassment and failed to take prompt remedial action. *See Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 (11th Cir.1997) (en banc) (Title VII); *Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1509 (11th Cir.1989) (§ 1981); *see also Dennis v.*

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[3] The disposition of these issues makes unnecessary discussion of the other issues raised by CSXT and the issues raised by Reynolds in her cross-appeal.

[4] Reynolds's hostile environment claims were based on direct, rather than indirect, liability. For a discussion of the difference between direct and indirect liability with regard to a hostile environment claim, *see Faragher v. City of Boca Raton*, 111 F.3d 1530, 1535-36 (11th Cir.1997) (en banc).

County of Fairfax, 55 F.3d 151, 155 (4th Cir.1995) (holding that, similar to a hostile environment sexual harassment action under Title VII, an employer cannot be liable under § 1981 for hostile environment racial harassment unless the employer "knew or should have known" of the harassment and failed to take prompt remedial measures). The employee can show that the employer knew of or should have known of harassment by proving either that she complained to higher management of the problem or that the harassment was so pervasive as to infer constructive knowledge on the part of higher management. *Faragher*, 111 F.3d at 1538.

CSXT essentially concedes that it knew of harassment in the medical records room once Jackson reported Reynolds's complaint, but argues that Reynolds failed to present legally sufficient evidence to prove that it did not take prompt remedial action after receiving that report. Reynolds argues that she presented sufficient evidence to show that harassment at CSXT was so pervasive that CSXT should have known of harassment well before her arrival, and, therefore, it did not act "promptly" even though it acted immediately after she complained and within five weeks of her arrival. The only evidence that Reynolds points to for support of this argument is Widney's testimony that during his roughly 35-year tenure at CSXT, he had seen male supervisors massaging the shoulders of their female subordinates.[5] We conclude that a reasonable juror could not find that such random and

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[5] Reynolds did not present any evidence that CSXT knew or should have known about racial harassment prior to her arrival at CSXT.

unidentified instances of shoulder massaging over a large expanse of time constitute harassment so pervasive that CSXT should have known of harassment prior to Reynolds's arrival.[6]

Reynolds argues alternatively that even if she did not present sufficient evidence that CSXT should have known of a hostile environment prior to her arrival, she did present sufficient evidence to show that CSXT actually knew of a hostile environment at that time. She points to Elson's testimony that Elson heard a third-person remark that Widney made an inappropriate comment to Turner about Turner's pregnancy. We reject this argument since Reynolds presented no evidence to show that Elson was considered higher management within CSXT, or that Elson had a duty to report to higher management an off-hand third-person remark. *See Kilgore v. Thompson & Brock Management, Inc.*, 93 F.3d 752, 754 (11th Cir.1996) (holding that hostile environment complaint to a manager not considered "higher management" does not suffice as direct notice to company).

CSXT, then, can only be directly liable for creating a hostile environment if Reynolds presented sufficient evidence to show that after CSXT received Jackson's report,

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[6] Reynolds does not argue, and we do not find, that the evidence of shoulder massages combined with the evidence of Widney's inappropriate behavior within the medical records room is legally sufficient to show that harassment at CSXT was so pervasive that CSXT had constructive notice of a hostile environment prior to Reynolds's complaint.

it failed to take prompt "remedial" action;[7] that is, action " 'reasonably likely to prevent the misconduct from recurring.' " *Id.* (quoting *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990)). " 'What is appropriate remedial action will necessarily depend on the particular facts of the case – the severity and persistence of the harassment, and the effectiveness of any initial steps.' " *Garcia v. Elf Atochem North America*, 28 F.3d 446, 451 (5th Cir.1994) (quoting *Waltman v. Int'l Paper Co.*, 875 F.2d 468, 479 (5th Cir.1989)).

In support of her contention that she presented sufficient evidence to show that CSXT failed to take "remedial action," Reynolds points to the evidence showing that even though CSXT conducted an investigation within days of her complaint, gave Widney a verbal warning, ordered him to attend sensitivity training, took away his supervisory powers, and transferred him to a file room where he would work alone, Widney still had access to the medical records room and used that access to stare at Reynolds and bump into her in the narrow aisles without excusing himself. She also points to the evidence showing that a previous same-floor transfer failed to remedy a different employee's feeling of discomfort upon seeing her alleged harasser.[8]

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[7] It is undisputed that CSXT took "prompt" action after it received Jackson's report.

[8] Reynolds presented no evidence showing that the alleged harasser received other forms of discipline as had Widney, or that the alleged harasser continued to act inappropriately after the same-floor transfer.

We conclude that this evidence, even viewed in the light most favorable to Reynolds, is legally insufficient to find that CSXT failed to take prompt "remedial" action. Reynolds herself testified that after CSXT took action against Widney, he never again said anything to her or touched her inappropriately. A reasonable juror could not find, as required by the hostile environment interrogatory, that the acts taken by CSXT, including immediate demotion, warning, transfer, and order to attend sensitivity training, did not constitute prompt action "reasonably likely to prevent the misconduct from recurring." Therefore, we conclude that the district court erred in denying CSXT's judgment as a matter of law as to the hostile environment claims.[9]

B. *Retaliation Claims*

Title VII prohibits an employer from taking adverse employment action against an employee in retaliation for her opposition to discriminatory practices. 42 U.S.C. § 2000e-3(a).[10] To establish retaliation, an employee must

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[9] CSXT also contends that Reynolds failed to present sufficient evidence of a hostile working environment caused by sexual and racial harassment. We need not address this contention.

[10] In its entry of judgment, the district court noted that the damages awarded for retaliation could be based on either Title VII or § 1981. This court has not yet addressed the types of retaliation claims cognizable under § 1981 in light of the Civil Rights Act of 1991. Since the outcome of this appeal makes the bases for the retaliation claims immaterial, we assume the claims were based on Title VII alone and decline to address whether Reynolds's claims are of the type that are cognizable under § 1981 as amended.

show that (1) she engaged in protected activity; (2) the employer was aware of that activity; (3) the employee suffered adverse employment action; and (4) there was a causal connection between the protected activity and the adverse employment action. *See Little v. United Technologies*, 103 F.3d 956, 959 (11th Cir.1997).

Reynolds based her retaliation claims on two separate instances of alleged retaliation. The first occurred in April, 1992, when CSXT caused Olsten Temporary to replace her for one week. The second occurred in February, 1993, when CSXT replaced all of the temporary staffers in the medical records room with permanent CSXT employees. The jury specifically found that CSXT retaliated on both occasions. CSXT contends that Reynolds failed to present sufficient evidence to show that she suffered adverse employment action on either occasion or that there was a causal connection between her complaints and her replacements.[11]

As to the first instance of alleged retaliation, we disagree with CSXT's contention. Reynolds presented evidence showing that very soon after she complained of Widney's conduct, Widney met with his superiors about an alleged error made by Reynolds, then contacted Olsten Temporary about the alleged error. Immediately after this

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[11] CSXT does not contend that Reynolds failed to offer sufficient evidence that the alleged retaliatory acts were condoned or directed by CSXT through higher management. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997) (holding that employee's retaliation claim failed because, among other things, employee failed to establish that the alleged retaliatory acts were condoned or directed by the employer).

contact, Olsten Temporary replaced Reynolds with a different temporary staffer, resulting in Reynolds being out of work for almost a week and being unpaid for the absence until almost six months later. During that week, Widney commented that Reynolds could no longer complain about sexual harassment. This evidence provides a sufficient basis for a reasonable juror to decide that Reynolds's 1992 complaint and replacement were causally connected and that Reynolds suffered adverse employment action.

As to the second instance of alleged retaliation, we agree with CSXT's contention that Reynolds failed to present legally sufficient evidence to establish a causal connection between the two events. She presented no evidence from which a reasonable juror could infer that CSXT's replacement of all of its medical records room temporaries with permanent CSXT employees in February, 1993, was related to her March and September, 1992, complaints.

In computing compensatory damages, the jury did not specifically distinguish between the acts of retaliation for which it compensated Reynolds. The jury form merely stated that Reynolds should be compensated $900 in lost wages due to "retaliation" and $200 in mental pain and suffering due to "retaliation." A careful review of the record reflects that the $900 in lost wages necessarily was in compensation for the second act of alleged retaliation, since CSXT had already fully compensated Reynolds for her lost wages due to the first act of retaliation. Because Reynolds did not present sufficient evidence that the second act constituted retaliation, we vacate the judgment for the $900. The record also reflects that the $200

for mental pain and suffering necessarily was in compensation for the first act of alleged retaliation, since Reynolds presented no evidence that she was mentally harmed by the second act. Because Reynolds presented sufficient evidence that the first act constituted retaliation, we affirm the district court's denial of CSXT's judgment as a matter of law as to that claim and uphold the $200 award. We also affirm the district court's denial of CSXT's motion for a new trial as to that claim, finding no abuse of discretion.[12]

C. *Punitive Damages Award*

Lastly, we must consider whether Reynolds's punitive damages award for retaliation can stand. To support a punitive damages award under Title VII, an employee

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[12] We reject CSXT's argument that Reynolds cannot recover under Title VII since she was technically employed by Olsten Temporary and not by CSXT. We have held that whether a defendant is an "employer" for Title VII purposes is based on the "economic realities" of the situation "viewed in light of the common law principles of agency and the right of the employer to control the employee." *Cobb v. Sun Papers, Inc.*, 673 F.2d 337, 341 (11th Cir.1982); *see also Amarnare v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 611 F.Supp. 344, 349 (S.D.N.Y.1984) (holding that Title VII allows employee of temporary agency to recover from firm to where she was assigned as long as she can establish that the firm exercised sufficient control over the means and manner of the employee's performance or where the firm interfered with the terms and conditions of her employment with the agency). Reynolds produced legally sufficient evidence to show that CSXT was her employer for Title VII purposes.

must show that her employer acted with "malice or reckless indifference to [her] federally protected rights." 42 U.S.C. § 1981a. "Malice" means " 'an intent to harm' " and "recklessness" means " 'serious disregard for the consequences of [one's] actions.' " *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir.1996) (quoting *Canada v. Boyd Group, Inc.*, 809 F.Supp. 771, 781 (D.Nev.1992)).

The evidence in this case showed only that the acts that could plausibly be deemed "malicious" or "reckless" were solely acts of Widney, who was not considered part of CSXT's higher management. Such evidence is insufficient to hold CSXT liable for punitive damages. *See id.* at 491-92 (holding that an employer will not be liable for punitive damages merely because a supervisor who is not part of "higher management" acted with the requisite "malice" or "reckless indifference"). Instead, Reynolds had to show that CSXT, through "higher management," countenanced or approved Widney's behavior. *Id.* at 491-92; *see also Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 943 (5th Cir.1996) (holding that punitive damages could not be assessed against a company that neither fostered nor ratified a harassing supervisor's behavior), *cert. denied*, ___ U.S. ___, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997); *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir.1995) (same). Reynolds presented no such evidence. In fact, the evidence shows just the opposite: CSXT posted its anti-harassment policy on the bulletin boards located on all floors, took Reynolds's complaints seriously, immediately reprimanded Widney for the part he played in having Reynolds replaced, invited Reynolds back to work within one week of her

replacement, and paid her for the days she missed because of the replacement.

Finding no evidence to support the jury's punitive damages award, we reverse the district court's denial of CSXT's motion for judgment as a matter of law as to the punitive damages claim.

V. *CONCLUSION*

Denial of CSXT's motion for judgment as a matter of law as to the hostile environment claims is REVERSED and judgment in favor of CSXT is RENDERED as to those claims.

As to the retaliation claims: the judgment of $200 for mental pain and suffering is AFFIRMED; the judgment of $900 for lost wages is VACATED; denial of CSXT's motions for judgment as a matter of law and new trial is otherwise AFFIRMED; denial of CSXT's motion for judgment as a matter of law as to the punitive damages claim is REVERSED and judgment in favor of CSXT is RENDERED as to the punitive damages claim.

The effect of this mandate is to reduce the total judgment in favor of Reynolds to the principal amount of $200.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-3364

ARLENE REYNOLDS,

Plaintiff-Appellee,
Cross-Appellant,

versus

CSX TRANSPORTATION, INC.,
a Virginia Corporation,

Defendant-Appellant,
Cross-Appellee,

ROGER WIDNEY, a Supervisory
Employee of CSX Transportation,
Inc.,

Defendant.

On Appeal from the United States District Court for the
Middle District of Florida

(Filed Jul. 28, 1997)

BEFORE: COX, Circuit Judge, KRAVITCH, Senior Circuit Judge and STAGG*, Senior District Judge.

---

* Honorable Tom Stagg, Senior U.S. District Judge for the Western District of Louisiana, sitting by designation.

PER CURIAM:

The petition(s) for rehearing filed by Appellee Arlene Reynolds, is denied.

ENTERED FOR THE COURT:

/s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ARLENE REYNOLDS,

Plaintiff,

-vs-

CSX TRANSPORTATION, INC., and ROGER WIDNEY,

Defendants.

_____/

CASE NO.
93-1316-Civ-J-10

(Filed Jul. 17, 1995)

ORDER OF JUDGMENT

This action came on for trial before the court and a jury, the Plaintiff having pled claims of sexual harassment under 42 U.S.C. § 2000e-5 ("Title VII"), racial harassment (Title VII and 42 U.S.C. § 1981), and retaliation for pursuing her discrimination claims. The jury returned a verdict on June 28, 1995 (Doc. 144), holding the Defendants liable under each theory of recovery. The damages awarded by the jury were as follows:

(1) Compensatory damages against CSXT (mental pain and suffering and lost wages): $ 1,500.00

(2) Compensatory damages against Widney: $ 400.00[1]

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[1] $200 for the Plaintiff's mental pain and suffering for the racial harassment, and $200 for mental pain and suffering for the retaliation, both of which may be properly attributed to the 42 U.S.C. § 1981 claims against Widney.

(3) Punitive damages:

a)	CSXT for sexual harassment	$167,000.00
b)	CSXT for retaliation	$167,000.00
c)	CSXT for racial harassment	$166,000.00
d)	Widney for sexual harassment	$ 1,000.00
e)	Widney for retaliation	$ 1,000.00
f)	Widney for racial harassment	$ 1,000.00

This Court is now faced with the task of entering judgment on the verdict while ascertaining the applicability of the cap on punitive damages in 42 U.S.C. § 1981a[2] ("§ 1981a").

42 U.S.C. § 1981a states that:

> "(a) (1) In an action brought by a complaining party under . . . (42 U.S.C. 2000e-5) . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section . . .
>
> "(b) (1) A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference. . . .

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[2] 42 U.S.C. § 1981a, the Civil Rights Act of 1991, provides for compensatory and punitive damages in Title VII cases, which were not available prior to its passage. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982).

> (3) The sum of the amount of compensatory damages awarded [for mental anguish] . . . and the amount of punitive damages awarded . . . shall not exceed, for each complaining party –
>
> > (D) in the case of a respondent who has more than 500 employees . . . $300,000."

The Plaintiff has argued that any limitation imposed by Title VII should apply only to each distinct violation of the statute, not as a cap on all damages awarded under Title VII for the entire action. However, the language of the statute on its face makes it clear that the limitation is for the entire action: "In an action brought . . . the complaining party may recover compensatory and punitive damages as allowed in subsection (b)," which states that the limitations are "for each complaining party." No reference is made to any separate violations within an action, and the Court will treat the cap as applying to the Title VII damages as a whole. The jury awarded a total of $500,000 in punitive damages against CSXT -- $167,000 for sexual harassment, $166,000 for racial harassment, and $167,000 for retaliation. Accordingly, after subtracting $600[3] from the maximum of $300,000 available against CSXT for mental anguish and punitive damages, $299,400 remains as the maximum amount of any punitive damages which may properly be awarded under Title VII in this case.

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[3] $200 each for the Plaintiff's mental pain and suffering for the sexual harassment, the retaliation, and the racial discrimination.

Punitive damages in the amount of $333,000 and compensatory damages in the amount of $1,300,[4] as attributable to the race and retaliation claims under § 1981 ($166,000 for race and $167,000 for retaliation), are not subject to any limitation on recovery. However, the disparity between the amount awarded to compensate the Plaintiff for her mental anguish and lost wages and the amount designated to punish and deter CSXT is so great that it shocks the judicial conscience. An award of over 250 times the amount of actual damages suffered by the Plaintiff is more than a penalty. Accordingly, that part of the award of punitive damages under § 1981a over the amount of $299,400 will be set aside as excessive.

With regard to Defendant Widney, the only claims brought against him were under § 1981 for discrimination and retaliation; therefore, only those portions of the jury verdict will be entered against him.

Accordingly, upon due consideration, the Court hereby finds that the Plaintiff is entitled to recover:

FROM CSXT:	Compensatory damages:	$ 1,500.00
	Punitive damages:	$299,400.00
	Total:	**$300,900.00**
FROM WIDNEY:	Compensatory damages:	$ 400.00
	Punitive damages:	$ 2,000.00
	Total:	**$ 2,400.00.**

[4] The punitive and compensatory damages awarded for racial discrimination and retaliation may be attributed to either Title VII or § 1981.

The Clerk is directed to enter judgment for the Plaintiff and against Defendant CSX Transportation for $300,900.00 and against Defendant Widney for $2,400.00, plus costs and attorney's fees to be assessed according to law.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 14th day of June, 1995.

/s/ Wm. Terrell Hodges
United States District Judge

Copy to counsel of record

Supreme Court, U.S.
FILED
DEC 22 1997
CLERK

No. 97-726 (2)

In The

Supreme Court of the United States

October Term, 1997

ARLENE REYNOLDS,

Petitioner,

vs.

CSX TRANSPORTATION, INC., A Virginia Corporation, and ROGER WIDNEY, a Supervisory Employee of CSX Transportation, Inc.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CSX TRANSPORTATION, INC.

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QUESTIONS PRESENTED

1. Whether this Court will grant certiorari in a hostile work environment sexual harassment case to consider an "agency" theory when the theory was not raised to or decided by the court of appeals, the court of appeals' opinion does not conflict with another circuit, and the facts presented would not support an "agency" theory.

2. Whether this Court will grant certiorari to consider Petitioner's contention that punitive damages must be assessed against an employer under 42 U.S.C. § 1981a in a case where the only plausible "malicious" or "reckless" acts were those of a first level supervisor, there is no conflict among the circuits on the issue, and the court of appeals' decision was correct as demonstrated by its application of the law to the facts.

3. Whether this Court will grant certiorari to review Petitioner's claim that the court of appeals made erroneous factual findings.

STATEMENT PURSUANT TO RULE 29.6

The following is the parent of respondent CSX Transportation, Inc.: CSX Corporation.

The following are the nonwholly owned subsidiaries of respondent CSX Transportation, Inc.: Allegheny and Western Railway Company; The Baltimore and Cumberland Valley Rail Road Extension; The Central Railroad Company of South Carolina; The Cincinnati Inter-Terminal Railroad Company; The Cleveland Terminal & Valley Railroad Company; Dayton and Michigan Railroad Company; The Home Avenue Railroad Company.

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Supreme Court Rule 10 26

Respondent CSX Transportation, Inc. ("CSXT") respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals dated June 20, 1997 is reported at 115 F.3d 860. Its order denying rehearing dated July 28, 1997 is not reported.

STATUTES INVOLVED

This case concerns 42 U.S.C. § 2000e-2(a)(1) which provides that:

> it shall be an unlawful employment practice of an employer —
>
> > to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment. because of such individual's race, color, religion, sex or national origin.

and 42 U.S.C. § 1981a(b)(1), which provides:

> a complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

STATEMENT OF THE CASE

Reynolds misstated or omitted a number of critical facts and procedural matters that are fatal to her petition. Following is an accurate statement of record facts and proceedings below.

A. Underlying Facts

Reynolds began working for Olsten Temporary Services in November 1991. In February 1992, Olsten offered Reynolds an assignment in the medical records file room at CSXT. Reynolds' duties included filing medical records in files maintained for company employees. CSXT's anti-harassment policy was posted on all bulletin boards on all floors, including the second floor where Reynolds worked.

Temporary workers performed some or all of the work in the medical records file room from 1988 to 1993. Because of concerns with employee confidentiality, Dr. Thomasino, Chief Medical Officer, preferred non-union represented individuals for handling the files. The 50,000 employee files contained sensitive medical information such as results of drug tests and whether employees could return to work. Because union members frequently moved in and out of jobs, Dr. Thomasino felt that a breach of confidentiality could more likely occur if union members held those jobs. As a result, union employees had not worked in the file room. Also, there was a freeze on promoting union-represented people and putting them into entry-level staff jobs, such as these. Accordingly, temporaries were used to perform the filing duties.

When Reynolds began work, the other temporaries in the file room were Vicki Allen, Darlene Davis, and Mindy Jennings. The Administrative Services Department, not the Medical Department, managed the file room. Roger Widney, Records Supervisor, was the Administrative Services employee responsible for maintaining the files. Widney reported to Les Backherms, Manager

Administrative Services, who reported to Jim Duguid, Director Administrative Services. Duguid reported to Susan Hamilton, Senior Assistant Vice President, Administrative Services.

The Eleventh Circuit's recitation of Widney's objectionable conduct toward Reynolds at pages 863 to 864 of its opinion correctly states the evidence viewed in a light most favorable to Reynolds. On the last of these isolated incidents, which occurred March 25 or 26, 1992, Reynolds left the file room and complained about Widney to Jay Jackson, a claims manager in the General Claims Department on the second floor, who was also an African Methodist Episcopal minister.[1]

Reynolds admitted Jackson took her complaint seriously; he told her he knew someone who could look into it and would contact her. Jackson referred the complaint to Greg Lunn, Assistant Manager EEO in CSXT's Employee Relations Department. Lunn met confidentially with Reynolds, Davis and Allen that day or the next day. Lunn told Reynolds he would refer the information to someone who would investigate it.

Elaine Tisdale, Senior Director Employee Relations, was responsible for investigating such complaints in the Administrative Services Department. Tisdale interviewed the temporaries within a few days of the complaint. During the interviews, Tisdale asked the temporaries how she could help, and they responded that they wanted the conduct to stop.

Susan Hamilton removed Widney from the medical records file room and from any supervisory duties, gave him a stern verbal warning, and required him to attend sensitivity training. Widney

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1. The Eleventh Circuit did not find that Widney "made statements to Ms. Reynolds indicating that if she did not put up with his sexually inappropriate conduct, she would lose her job with CSXT" (*see* Petition at 4); rather, it found that Reynolds "testified that certain comments by Widney gave her the impression that a complaint would be ineffectual."

was given a job working alone in the general claims file room on the second floor. Lana Brantley replaced Widney in the medical records file room. Reynolds liked Brantley, saying that she was "very nice" and "a good supervisor." Reynolds never complained to Brantley about Widney.

Widney had to train Brantley, but before that training was complete, Dr. Cook in the Medical Department confronted Widney about a filing error that Widney believed Reynolds had made. Widney asked his supervisor, Backherms, what he should do. Backherms discussed the matter with Duguid. After discussing the matter with Backherms and Duguid, Widney called Olsten, which assigned a different temporary to CSXT. Widney testified he believed that it was Reynolds who made the filing mistake but did not know the identity of the person who had complained to the Employee Relations Department. However, Reynolds testified that when she went back to collect her personal belongings, she heard Widney state to Jennings, "let me see if she's going to run upstairs on sexual harassment now."

Reynolds misstates the record concerning Backherms and Duguid. Backherms confirmed that Widney came to him expressing concerns as to Dr. Cook's objections about misfiling. Widney told Backherms that Reynolds was responsible for that filing. Backherms told Widney he needed to talk to his boss since Reynolds worked for Olsten and already had worked at CSXT for about two months. R13-88.

Backherms told Duguid about Widney's concerns with Dr. Cook's objections. R13-89. Duguid said that if they weren't satisfied with a temporary employee, they should just notify Olsten for an exchange. *Id.*

Neither Duguid nor Backherms knew who complained about Widney. R13-63, 89. Indeed, Backherms testified that Duguid asked him whether Reynolds was the person who had complained. R13-

90. Duguid also testified that they discussed the possibility that Reynolds was the person who had complained, and that replacing her could be considered retaliation. R13-35-37. After considering this possibility, Duguid and Backherms decided that Reynolds could not be the person (R13-89 to 90), and both testified that they did not think that replacing Reynolds sounded or looked like retaliation. R13-37, R13-90-91. Reynolds was not the first temporary that Widney had asked Olsten to replace. R13-87. Other temporaries had been replaced in the past because of mishandling and misfiling files. R10-173. Furthermore, Duguid explained that when the Medical Department complained, they generally replaced the temporary. CSXT did not progressively discipline temporaries, but looked to the temporary agency to provide someone else. R13-65 to 66. After talking with Duguid, Backherms told Widney that he could call Olsten to ask if they would send a replacement. R13-91. Duguid thought that Lana Brantley was going to make the call. R13-36. No witness contradicted Backherms' and Duguid's testimony concerning their thought processes.

On April 16 or 17, 1992, Tisdale learned that Reynolds had been replaced. She immediately left a message on Reynolds' answering machine telling her that she would get back in touch after she investigated. Tisdale soon concluded that Reynolds should be brought back and paid for the lost time. Hamilton, who did not like the appearance created by replacing Reynolds, agreed. She apologized to Reynolds, and Reynolds returned to work April 23, 1992. Reynolds was later paid for her lost time.

CSXT was more concerned for Reynolds than for any appearance of guilt caused by bringing her back, as Hamilton testified:

> Q. [By CSXT'S counsel] You've been asked a lot . . . about Arlene Reynolds returning to the file room, returning to work. . . . Weren't you concerned that by bringing her back, it would

> look like the company had done something wrong? Was guilty of something?
>
> A. Well, I couldn't worry about that because the right thing to do was to bring her back. I owed her an apology. I owed her the opportunity, if she wanted to come back . . . .

CSXT disciplined Widney further for his part in Reynolds' replacement. Hamilton prepared a written reprimand for his file and fined him five percent of his pay for six months. Backherms was reprimanded and lost fifty percent of his 1992 bonus. Duguid was also reprimanded.

Reynolds admitted that after she complained of Widney's conduct on March 26 or 27, 1992, he never said anything to her or touched her inappropriately again. As the Eleventh Circuit noted in its opinion, Reynolds' trial testimony about whether she complained about Widney between March 1992 and when she filed her JEOC charge contradicted her deposition testimony and changed again during an overnight trial recess. Nevertheless, the Eleventh Circuit credited Reynolds' testimony that during this period, Widney looked in the file room and stared at her when Brantley was there, whistled in an irritating manner, and bumped[2] into her when passing her without saying excuse me.

In September 1992, Reynolds filed a charge of discrimination

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2. According to Reynolds bumping did not mean touching:

> Bumps — you know, he was bumping into us like we had to pass each other. Because the way the department is built, it's built to where you can't help but to run into somebody, not one time a day but several times. It was a job where you didn't stay in your seat. You constantly ran back and forth to one end of the Medical Department to the other end, which is that, where he was at.

in which she complained that Widney continued to engage in inappropriate conduct. Tisdale investigated the charge. CSXT then moved Widney to the ninth floor to perform a job that had just become available. Hamilton felt that this would alleviate any remaining awkwardness between Widney and the temporaries.

Reynolds worked at CSXT until February 1993, when Hamilton replaced Reynolds, Allen, and three other file room temporaries who were assigned to CSXT after Widney had been removed. The positions were filled with employees who were losing their own jobs in a downsizing. If these employees had not found employment, they would have been furloughed or would have lost their jobs. Hamilton testified that the union's agitation that CSXT employees were not working in the jobs was also a factor that led to her decision. When CSXT employees assumed the file room duties, file room supervision was turned back over to the Medical Department, which Dr. Thomasino had wanted for a long time. Jennings, who at that time was assigned as a temporary to the Medical Department, was also replaced. Around the same time, surplus employees were also absorbed in the real estate area on a labor intensive project where the plan had been to use temporaries. R15-28 to 29. It was part of Hamilton's responsibility to help find individuals other jobs within the company. R15-29 to 30.

The Eleventh Circuit rejected as a matter of law Reynolds' attempt to show pretext by relying on the "position paper" that Duguid wrote in the fall of 1992 about the use of temporary employees. 115 F.3d at 868. Despite Reynolds' selective and argumentative comments about it in the Eleventh Circuit and in her petition at 28 to 30, Duguid's paper represented a two to three month effort to gather data and analyze and outline issues relating to the use of temporary employees. PX 19; R13-54 to 58. Hamilton testified that her superior, Gerry Nichols, asked Duguid to prepare the report to examine the use of temporary employees as a part of a review of corporate expenses. R12-168. In fact, Duguid's job duties included responsibility for reviewing numerous items of

expense to the company. *Id.* Among the alternatives that Duguid considered was replacing the temporaries in the file room and the temporaries who supported the Medical Department with "surplus employees." PX 19, at 3. Ultimately, as Hamilton (the decision maker) explained at trial, non-union or "staff" employees replaced the temporaries then in the file room and Jennings, who at that time was assigned to the Medical Department. Most of the other temporaries discussed in Duguid's paper worked at CSX Technology, a separate company not within Hamilton's responsibility. R12-175.

The factors leading to Hamilton's decision to replace the temporaries were uncontradicted. If the employees who were losing jobs elsewhere in the company had not found employment, they would have been furloughed or would have permanently lost their jobs. Therefore, although temporaries are sometimes less expensive, as recognized by Duguid's paper, the employees who began working in the file room in February 1993 would have been entitled to a buyout (an expense to the company) and continued insurance benefits if they left. Alternatively, they could have "pulled back on their union seniority," which could have led to the possibility of a paid furlough. As Hamilton testified, it made economic sense to find them jobs rather than to face the possibility of paying them for doing no work or in a buyout.

Within three weeks after she left CSXT, Olsten assigned Reynolds to a position she liked at an insurance company with better overtime opportunities. While working there, Reynolds filed a second charge of discrimination asserting that CSXT retaliated against her for filing her first charge.

B. Proceedings in the District Court

Reynolds filed a complaint on September 20, 1993, alleging sexual harassment and retaliation in violation of Title VII of the Civil Rights Act of 1964. Reynolds filed an amended complaint

adding various tort claims against CSXT, all of which were later dismissed or dropped. A second amended complaint alleging racial harassment under 42 U.S.C. § 1981 was allowed July 18, 1994.

At trial, Reynolds raised two theories of liability for harassment, namely "knew or should have known" and a "mixed case" theory. On appeal, she abandoned the second theory.

At the close of all the evidence, Reynolds sought judgment as a matter of law "on the issue of the mixed environment quid pro quo strict liability basis . . ." R15-65. She contended that "Mr. Widney's act of retaliation established a quid pro quo case or a mixed case which would include quid pro quo and hostile environment." R15-66.

When her motion was denied, Reynolds' counsel requested a jury instruction and an addition to the verdict form on what he labeled "strict liability" and "direct liability," stating:

> "In a quid pro quo case, a supervisor is an agent of the corporation because he exercises the authority actually delegated to him by his employer by making or threatening to make decisions affecting the employment status of his subordinates," citing *Sparks*. "When this occurs, the corporate defendant is strictly liability for the acts of the supervisor," citing *Steele*.
>
> "Similarly, in a mixed case involving both quid pro quo and hostile environment and sexual harassment, strict liability applies," citing *Steele*.

R15-74. Reynolds was reading from the district court's earlier denial of CSXT's motion for summary judgment.

The district court declined this request, stating:

> It seems to me there's absolutely no evidence in this case of a quid pro quo type of gender discrimination . . . as distinguished from an abusive or hostile work environment form of gender discrimination. . . .

The district court asked Reynolds' counsel:

> You are making a claim that this is a mixed case, but there's no evidence, is there, of any demand for sexual favor by the defendant?
>
> Reynolds' Counsel: There was a demand that the plaintiff surrender her federally protected rights, or she was threatened with termination.
>
> The District Court: But not as a demand for sexual favor of any kind. Was there?
>
> Reynolds' Counsel: No, sir. But, Your Honor, may I please read what you say — in denying the motion for summary judgment, you say, "In view . . ." — and this is on page 4 of your order. "In view of the relevant law, two issues require resolution here. The first is whether Widney possessed actual or apparent authority to hire, fire, discipline, or promote," quoting Henson. "If so, a second issue arises; namely; whether any evidence exists indicating that Widney explicitly or implicitly threatened to use his authority against the victim," quoting Sparks. And, Your Honor, that's all we're asking here, is that these issues be —
>
> The District Court: But implied in that last statement is a demand for sexual favor. And there just hasn't been any in the evidence in the case now that it has been tried, in my view. So I'll not alter the [jury] interrogatories in that respect.

The district court therefore instructed the jury that CSXT could be liable for a hostile or abusive work environment if it "knew or should have known of the alleged sexual and/or racial harassment, and failed to take appropriate remedial action."

CSXT appealed the jury finding of liability under a "knew or should have known" theory. Reynolds filed a cross appeal and listed nine proposed issues in her Civil Appeal Statement Form. Issues one through three related to "mixed" sexual harassment. For example, the first issue was "[w]hether the District Court erred by concluding that Plaintiff's allegations of sexual harassment did not constitute a case of 'mixed' sexual harassment?"

In her brief to the Eleventh Circuit, however, Reynolds abandoned *any* alternate theory. In her answer brief, Reynolds stated:

> Reynolds agrees that there are five elements of a cause of action for hostile environment sexual harassment, as set forth in CSXT's Initial Brief.

This was in response to CSXT's initial brief, which set forth the five part "knew or should have known" test, citing *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982) and *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311 (11th Cir. 1989):

1. Reynolds belonged to protected group;

2. She was subjected to unwelcome sexual harassment;

3. The harassment was based on sex;

4. The harassment affected a term, condition or privilege of employment in that it was sufficiently severe or pervasive to alter the conditions of

> employment and create an abusive work environment; and
>
> 5. CSXT knew of the problem and failed to take prompt remedial action.

Reynolds' answer brief contained no argument, either on the main appeal or on cross appeal, that the Eleventh Circuit should affirm the district court judgment on any alternate theory of liability.[3]

C. The Decision of the Court of Appeals

The Eleventh Circuit decided three issues. First, the Eleventh Circuit determined that the evidence was legally insufficient to show that CSXT knew of harassment and failed to take prompt remedial action. In focusing its analysis, the Eleventh Circuit specifically recognized the limited nature of plaintiff's claims, stating in footnote 4 that: "Reynolds's hostile environment claims were based on direct, rather than indirect liability." 115 F.3d at 866.

The Eleventh Circuit held that CSXT knew or should have known of Widney's conduct only when Jackson reported Reynolds' complaint, but that:

> A reasonable juror could not find . . . that the acts taken by CSXT, including immediate demotion, warning, transfer, and order to attend sensitivity

3. Just 10 days before the Eleventh Circuit's decision, Reynolds mailed a Notice of Supplemental Authority favorably citing the new decision in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 66 U.S.L.W. 3351 (1997) (which she now claims is wrong). Although a notice of supplemental authority would not have preserved the issue (*see* page 15 below), Reynolds did not assert that any theory of liability should apply other than the "knew or should have known" theory she had conceded applied.

> training, did not constitute prompt action "reasonably likely to prevent the misconduct from recurring." Therefore, we conclude that the district court erred in denying CSXT's judgment as a matter of law as to the hostile environment claims.

115 F.3d at 868.

On a second issue, the Eleventh Circuit held that although a reasonable juror could find that Reynolds' 1992 complaint and replacement "were causally connected," Reynolds failed to present legally sufficient evidence to support the claim for retaliation in CSXT's 1993 replacement of all of its medical records file room temporaries with permanent CSXT employees. Therefore, the court upheld the $200 award relating to Reynolds' mental pain and suffering for her temporary replacement but vacated the judgment for $900 in lost wages relating to the second alleged retaliation.

On a third issue, the Eleventh Circuit reversed the district court's denial of a motion for judgment as a matter of law on punitive damages for retaliation. The court held that Reynolds presented no evidence of "malice" or "recklessness," except for, "plausibly," Widney's:

> In fact, the evidence shows just the opposite: CSXT posted its anti-harassment policy on the bulletin boards located on all floors, took Reynolds's complaints seriously, immediately reprimanded Widney for the part he played in having Reynolds replaced, invited Reynolds back to work within one week of her replacement, and paid her for the days she missed because of the replacement.

115 F.3d at 869.

After the Eleventh Circuit rendered its June 20, 1997 decision,

Reynolds filed a Petition for Rehearing but did not criticize the Eleventh Circuit's failure to analyze an alternate theory of liability.

REASONS FOR DENYING THE WRIT

This case does not present the questions stated in the petition. Reynolds did not pursue an agency theory of liability below, and the court of appeals did not decide that issue. Therefore, the Eleventh Circuit's decision is not in conflict with decisions applying agency principles. On punitive damages, the conflict between the circuit courts of appeal urged by Reynolds does not exist, and the Eleventh Circuit's application of the statute to the facts demonstrates the fallacy of Reynolds' per se rule. Finally, this is not the extraordinary case that justifies this Court's review of factual determinations.

I.

THIS COURT SHOULD NOT GRANT CERTIORARI TO CONSIDER AN "AGENCY" THEORY OF EMPLOYER LIABILITY NOT RAISED TO OR DECIDED BY THE ELEVENTH CIRCUIT.

A. "Agency" Theory Of Employer Liability Not Preserved.

This Court does not take up issues not raised to or passed on by the court below. *E.g.*, *United States v. Wells*, __ U.S. __, 117 S. Ct. 921, 137 L. Ed. 2d 107, __ (1997); *EEOC v. FLRA*, 476 U.S. 19, 24, 106 S. Ct. 1678, 1681, 90 L. Ed. 2d 19 (1986); *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 1155, 67 L. Ed. 2d 287 (1981); *United States v. Ortiz*, 422 U.S. 891, 898, 95 S. Ct. 2585, 2589, 45 L. Ed. 2d 623 (1975).

Reynolds never argued to the Eleventh Circuit that the verdict in the district court could have been sustained on a theory of "indirect liability," a phrase the Eleventh Circuit uses for the vicarious liability of an employer for harassment by a supervisor

under agency principles. Reynolds now tries to bootstrap the discussion of agency principles in *Faragher v. City of Boca Raton*, 111 F.3d 1530 (11th Cir.), *cert. granted*, 139 L. Ed. 2d 337 (1997), onto her case by stating that the Eleventh Circuit based its decision on the "intervening" *Faragher* case. Petition at 9. The Eleventh Circuit did not rely on any agency theory discussed in *Faragher*, and Reynolds cannot fairly criticize the Eleventh Circuit for failing to apply a theory she never raised.

Reynolds dropped even her "mixed" harassment argument (an argument conceptually different from the one she currently espouses) when she agreed with CSXT's "knew or should have known" statement of the liability issue and asserted no alternative theory in her brief. In the Eleventh Circuit, an issue must be briefed to be considered. *See Lewis v. Secretary of Agriculture*, 73 F.3d 312, 317 n.2 (11th Cir. 1996); *McBride v. Sharpe*, 25 F.3d 962, 970 (11th Cir.), *cert. denied*, 513 U.S. 990, 115 S. Ct. 489, 130 L. Ed. 2d 401 (1994). Rule 28(a)(6), Federal Rules of Appellate Procedure, when read with Rule 28(b), requires that each brief contain an "argument" section with

> the contentions of the [appellant or appellee] on the issues presented, and the reasons therefor, with citations to the authorities, statutes, and parts of the record relied on.

Moreover, a party cannot raise an issue for the first time in a notice of supplemental authority. *United States v. Blasco*, 702 F.2d 1315, 1332 n.28 (11th Cir.), *cert. denied*, 464 U.S. 914, 104 S. Ct. 275, 78 L. Ed. 2d 256 (1983).

Consistent with the briefs, the Court of Appeals expressly stated in footnote 4 of its opinion that Reynolds's hostile environment claims were based on direct, rather than indirect, liability. Reynolds failed to disagree with the Eleventh Circuit's characterization in her Petition for Rehearing, which

> must state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and must contain such argument in support of the petition as the petitioner desires to present.

Fed. R. App. P. 40(a). Therefore, the petition should be denied as to the first issue.

B. The Eleventh Circuit's Opinion Does Not Conflict With The Decision Of Another Circuit.

After blaming her failure to preserve an agency theory on the Eleventh Circuit and implying that her case presents an agency theory simply because *Faragher* did, Reynolds next surveys the decisions of the courts of appeal regarding agency principles in an attempt to create a conflict that does not exist.

Because the "matter" on which Reynolds now seeks certiorari jurisdiction was not raised, and the Eleventh Circuit did not consider it, that court did not enter "a decision in conflict with the decision of another United States court of appeals on the same important matter." Reynolds' real argument is that *Faragher*, not *Reynolds*, is in conflict with decisions of other courts of appeal. Petition at 11. *See also* Petition at 13 ("the Eleventh Circuit's determination [regarding the word 'aided' in *Faragher*] is in error, and in direct conflict"). The alleged conflict between *Faragher* and decisions of other circuits does not help Reynolds because in this case, the Eleventh Circuit cited *Faragher* simply to refer to the "knew or should have known" standard, for which *Faragher* acknowledges the Eleventh Circuit's earlier decisions in *Henson* and *Steele*.

Moreover, the decision in *Faragher* is not in conflict with the court of appeals decisions cited by Reynolds. The standard articulated in *Faragher* does not conflict with the principles articulated in those cases, and there were no facts in *Faragher*

showing that the alleged harassers used or relied on their supervisory authority in accomplishing the harassment.

C. The Facts Presented And Decided In The Appeal Fail To Support Liability Under An Agency Theory.

The pertinent facts found by the Eleventh Circuit would not support liability under an agency theory in any event.

Reynolds now argues that the Eleventh Circuit:

> should have affirmed the jury's finding . . . because Widney was aided in accomplishing the harassment by the existence of the agency relationship between CSXT and himself.

Petition at 17. She further contends at page 18, footnote 8, that the Eleventh Circuit:

> acknowledged that Widney threatened Ms. Reynolds and the other temporary employees' jobs if they complained about his sexually inappropriate conduct . . . .

The Eleventh Circuit made no such holding. Rather, the court adopted Reynolds' statement about Widney's comments in her brief almost verbatim:

> Reynolds . . . . testified that certain comments made by Widney gave her the impression that a complaint would be ineffectual. Reynolds testified that, for example, Widney would say "what goes on in the file room stays in the file room" and that if any complaints were made to his superiors, the superiors would back him up. Widney also stated from time to

> time something to the effect of "the first to complain will be the first to go."

115 F.3d at 863. In her Eleventh Circuit brief, Reynolds presented no facts linking such statements by Widney to any sexual comments or behavior towards her; nor did Reynolds cite any evidence that Widney made threats that he would dismiss her if she would not allow him to engage in sexually oriented conduct.

Reynolds asserts that the cases cited for conflict with *Faragher* hold that an employer is liable under agency principles if the supervisor uses actual or apparent authority to further the harassment or is aided in accomplishing the harassment by the existence of the agency relationship. Reynolds did not argue below, and the Eleventh Circuit did not find, that Widney's comments making the temporaries feel that complaints about him would be ineffectual aided him in accomplishing any harassment of Reynolds. To the contrary, Reynolds complained about Widney, and the conduct she complained about stopped. Likewise, Widney's subsequent replacement of Reynolds did not aid him in engaging in sexually harassing conduct: he never engaged in any sexually-oriented conduct again; Reynolds was invited to return; and Widney was punished. In summary, the Eleventh Circuit found no "threats to condition the plaintiff's future employment upon submission to inappropriate sexual conduct" as asserted by Reynolds. Petition at 17 to 18. Widney's conduct simply gave rise to a retaliation claim for which CSXT was found liable.

Reynolds' current, unpreserved, position reduces to this: Widney's retaliatory act, caused by Reynolds' protected activity, automatically supports liability for hostile work environment sexual harassment based on agency status. No circuit has applied such a principle, making this unpreserved issue that is not in conflict with other courts of appeal even more inappropriate for certiori review.

II.

REVIEW IS NOT NEEDED TO DETERMINE WHETHER PUNITIVE DAMAGES ARE ALWAYS RECOVERABLE IN A CASE WHERE THERE IS LIABILITY FOR COMPENSATORY DAMAGES FOR A FIRST LEVEL SUPERVISOR'S ACT.

The punitive damages issue involves only the claim for retaliation relating to Reynolds' replacement in the file room for one week. Reynolds bases her petition on an alleged conflict between the Eleventh Circuit's determination and decisions of the Seventh, Eighth, and D.C. Circuits. No conflict exists. None of the cases relied on for conflict decided the issue before the Eleventh Circuit in this case: assuming that "malicious" or "reckless" conduct by a first level supervisor is sufficient for punitive damages, does the evidence also support punitive damages against the employer?[4] Rather, *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997); *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996); and *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997), all involve determinations of whether the quantum of evidence *in those cases* was sufficient to sustain punitive damages; none addressed a specific supervisory level at which such damages would always be sustained. In fact, the legal standards they apply for punitive damages (to different facts) are readily harmonized with *Reynolds*.

In *Reynolds*, the Eleventh Circuit held that CSXT was not liable for punitive damages based on the act of Widney, which the court labeled as "plausibly . . . 'malicious' or 'reckless.' " Like each of

4. Reynolds embeds in the issue her unsupported factual argument that "upper management . . . expressly approv[ed]" the supervisor's "causing the discharge" in the "Questions Presented for Review." Of course, the facts entirely negate that contention. Hamilton immediately brought Reynolds back and punished Widney, Backherms and Duguid. Moreover, Backherms and Duguid were unaware of any malicious, reckless, or even retaliatory motive by Widney.

the other courts of appeal cited, the Eleventh Circuit analyzed whether the evidence in the case at hand supported a conclusion that the corporate defendant acted with "malice or reckless disregard." As demonstrated below, established precedent holds that punitive damages *may* be imposed in a Title VII or 42 U.S.C. § 1981 case, depending on the specific facts of the case, not that they *must* be. Indeed, on January 21, 1997, this Court denied a petition for certiorari on the standard for punitive damages under 42 U.S.C. §§ 1981, 1981a. *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 767, 136 L. Ed. 2d 713 (1997).

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720, 44 L. Ed. 2d 295 (1975), this Court held that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, *under certain circumstances*, punitive damages." (Emphasis added). Punitive damages are "never awarded as of right, no matter how egregious the defendant's conduct. . . ." *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638, 75 L. Ed. 2d 632 (1983). The purpose of punitive damages is to "punish" the defendant and "deter" him and others like him from similar conduct. 461 U.S. at 54, 103 S. Ct. at 1639.

Enacting these long-standing principles, 42 U.S.C. § 1981a provides that a

> complaining party *may* recover punitive damages . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(Emphasis added).

The decisions of the Seventh, Eighth, and D.C. Circuits that Reynolds cites likewise hold that a respondent *may* be liable for punitive damages under the discrimination laws, not that such damages are *mandated* regardless of the circumstances, once liability is allowed based on the conduct of a company employee, even if that employee is part of higher management. The per se rule ultimately advocated by Reynolds in the petition[5] was not briefed to the Eleventh Circuit, has never been the law, is not supported by any case cited by Reynolds, and contradicts the applicable statute, 42 U.S.C. § 1981a.

Reynolds relies primarily on *Kolstad v. American Dental Ass'n*, 108 F.3d 1431 (D.C. Cir. 1997). The issue in that case was whether punitive damages are recoverable only in "extraordinarily egregious cases." *Id.* at 1437. The court rejected that standard because "evidence that suffices to establish an *intentional* violation of protected civil rights also may suffice to permit the jury to award punitive damages. . . ." 108 F.3d at 1438. In *Kolstad*, the employer's highest management engaged directly in discriminatory actions. In directing that punitive damages be submitted to the jury, the court articulated its reasoning based on specific facts of the case: the employer, acting through highest management, did not try to justify the use of sex in its promotion decision; it did not disavow the acts of its agents; and it flatly denied the allegation of "invidious sex discrimination, discrimination lying at the heart of Title VII." *Kolstad* at 1439. Nevertheless, the court expressly rejected the blanket proposition (advocated by Reynolds here) that

> evidence sufficient to establish liability under Title

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5. On pages 20 and 21, Reynolds contends that if the supervisor's act of termination was within his authority, the employer is "indirectly" liable for the supervisor's "malicious conduct." On page 21, she urges the Court to decide that punitive damages always flow when there is "evidence of intentional discrimination sufficient to establish liability under Title VII." Reynolds never presented this argument to the Eleventh Circuit and cannot raise it belatedly now.

> VII for intentional discrimination will *always* sustain an award of punitive damages under section 1981a.

Id. at 1438. (Emphasis added).

The Seventh Circuit in *Merriweather v. Family Dollar Stores of Indiana, Inc.*, 103 F.3d 576 (7th Cir. 1996) also rejected a heightened standard of proof for punitive damages — that the employee would have to "present direct evidence that [the district manager, who made the decisions] was aware of the fact that he was violating [the plaintiff's] civil rights when he discharged her." *Id.* at 581. Like the D.C. Circuit, the Seventh Circuit held that "[e]vidence that suffices to establish an intentional violation of protected civil rights also *may* suffice to permit the [factfinder] to award punitive damages. . . ." *Id.* (Emphasis added). The court did not hold that the employer was liable for punitive damages just because the district manager (who was at least at the third level of management in the district) retaliated against plaintiff. Rather, the necessary quantum of evidence was present, considering all of the evidence presented in the case.

Reynolds also cites *Kim v. Nash Finch Co.*, 123 F.3d 1046 (8th Cir. 1997). That decision is not in conflict with *Reynolds*. Like the Second and D.C. Circuits, the court in *Kim* rejected the argument that punitive damages are limited to "exceptional circumstances of unusual bad motive that transcends ordinary intentional misconduct." *Id.* at 1065. The Eighth Circuit in *Kim* also rejected Reynolds' contention, stating that it did not "decide whether recovery of punitive damages under Title VII requires a 'heightened' showing beyond intentional discrimination." 123 F.3d at 1066, n.5. Moreover, the court recited at pages 1066-1067 an extensive paragraph of specific circumstances supporting an award of punitive damages against the employer for the acts of both the warehouse superintendent (who ran the company warehouse) and multiple company supervisors.

Contrary to Reynolds' assertion, these cases do not conflict with the three recent cases that the Eleventh Circuit cited in reaching its decision in *Reynolds*: *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996), *Patterson v. PHP Healthcare Corp.*, 90 F.3d 927 (5th Cir. 1996), and *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995). Indeed, Reynolds admits that *Splunge* "is consistent with the standards for punitive damages under § 1981a." Petition at 20. Splunge involved unlawful harassment by four levels of management, the dining room supervisor up through the area supervisor. *Id.* at 489. The court determined that while management higher up in the corporate hierarchy was negligent in not stopping or preventing the harassment, the company had an anti-harassment policy and investigated complaints that it received. *Id.* at 491. Therefore, no management higher than those involved in the harassment "acted with the state of mind required by Section 1981a." *Id. Splunge* aided the Eleventh Circuit's analysis of the facts in *Reynolds* where only the lowest supervisor's acts could plausibly be "malicious" and "reckless," and the company acted immediately to rectify even an appearance of retaliation.

The other two cases the Eleventh Circuit cited in support of its decision, *Patterson* and *Fitzgerald*, are also fact-centered and can be harmonized with the decisions of the other circuits. The Fifth Circuit in *Patterson* recognized that a party "who establishes a cause of action under 42 U.S.C. § 1981 may be entitled to punitive damages 'under certain circumstances.' " 90 F.3d at 941, *quoting Johnson v. Railway Express Agency*, 421 U.S. at 460, 95 S. Ct. at 1720. The court held that the evidence did not support punitive damages because: the only individual engaging in intentional discrimination and retaliatory discharge "was not a corporate officer of PHP Healthcare, but was the 'project manager' of the Fort Hood Office"; the company had a policy prohibiting discrimination; and the company did not authorize, ratify, or approve his actions. *Id.* at 944. The court added that prompt remedial actions by an employer are important to a review of the imposition of punitive damages. *Id.* at 944, n.15.

In *Fitzgerald*, a training facilitator terminated plaintiff's continued participation in a company training program. The court attributed actions of the facilitator to the employer for compensatory damages, but held that her act was not "malicious, willful, and in gross disregard of [plaintiff's] rights" on the part of the employer to sustain punitive damages. 68 F.3d at 1263. As did the other circuits, the Tenth Circuit in *Fitzgerald* examined the specific circumstances of the case and held that the evidence did not support punitive damages. Specifically, the facilitator did not have the typical discretion of a manager; the company did not ratify or approve her acts of intentional discrimination; and the company conducted an investigation that took plaintiff's complaints seriously, although it came to the conclusion that intentional discrimination had not occurred.

As in other circuits, the Eleventh Circuit decided *Reynolds* based on the evidence presented. It said that only Widney's conduct was "plausibly" malicious or reckless. Backherms and Duguid, both below the level of assistant vice president, believed Dr. Cook complained about filing errors and did not know Reynolds was the one who complained about Widney. Temporaries had been replaced before when problems arose. These men considered but rejected the conclusion that Reynolds had been the one to complain. If Widney had a retaliatory and malicious or reckless state of mind, they were unaware of it.[6]

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6. CSXT also argued below that it could be liable for punitive damages only on the basis of the actions of a managing agent or primary owner. *Mr. Furniture Warehouse, Inc. v. Barclays American/Commercial, Inc.*, 919 F.2d 1517, 1524 (11th Cir. 1990), *cert. denied*, 502 U.S. 815, 112 S. Ct. 68, 116 L. Ed. 2d 43 (1991). Managerial authority, unaccompanied by the power to participate in the formation of company policy, does not make an employee a managing agent. *Id.* (assistant vice president of defendant not managing agent); *Pier 66 Co. v. Poulos*, 542 So. 2d 377, 381 (Fla. 4th DCA 1989). Reynolds offered no evidence that either Duguid or Backherms was a managing agent of CSXT. Even if they were, the Eleventh Circuit's decision reflects that Reynolds failed to introduce any evidence CSXT acted in a manner that would support an award of punitive damages.

Further, CSXT never conceded that Backherms and Duguid were higher management or that they condoned or directed retaliatory acts by Widney, despite Reynolds' attempt to create this impression by twisting footnote 11 of the Reynolds decision. Petition at 18, 19. Footnote 11 simply noted that CSXT did not try to avoid liability for compensatory damages for retaliation on the contention that the acts were not condoned by CSXT through higher management. The Eleventh Circuit never decided that Backherms and Duguid were higher management, and the record contradicted that conclusion. As discussed in footnote 6, CSXT consistently contended that Duguid and Backherms were not "managing agents." And, as shown above, the record would not support a finding of "maliciousness" or "recklessness" on their part, or CSXT's part, even if they were. Moreover, Reynolds did not argue in her brief below that the actions of Duguid or Backherms she relies on in her Petition supported punitive damages relating to her one week replacement. Therefore, Reynolds' petition, which claims a conflict only through a gross misreading of the Eleventh Circuit's opinion and the opinions of other courts, must be denied.

This case is also a poor candidate for certiorari because the result shows a proper analysis. CSXT acted sincerely, vigorously, promptly, and effectively to protect Reynolds' rights. Each time Reynolds complained, CSXT took appropriate action. When Reynolds was replaced in the file room for one week in April 1992, Hamilton put her concern for Reynolds above any consequences or appearances that returning Reynolds to the file room would create.

In summary, no court has ruled the way that Reynolds wants this Court to rule. All of the circuit decisions Reynolds cites hold that punitive damages are not required simply because there is liability for compensatory damages. In all the cases, the circuits reviewed the specific facts to determine whether the quantum of evidence was sufficient to sustain them. Reynolds never made her current argument below. Finally, the Eleventh Circuit's decision

was consistent with the important principle that a company that takes prompt and sincere action has not acted maliciously or with reckless disregard for a plaintiff's rights. A corporation's sincere efforts which remedy workplace problems should be encouraged, not punished. Any result other than the one reached would have a devastating impact on companies that strive to prevent harm to others from their employee's actions.

III.

THIS IS NOT THE RARE CASE IN WHICH THIS COURT SHOULD REVIEW FACTUAL FINDINGS.

Rule 10 provides:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Reynolds sets forth no rationale compelling departure from established principles against granting certiorari to review factual findings. Issues which are primarily factual questions do not merit certiorari review. *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 177 n.8, 102 S. Ct. 216, 222, 70 L. Ed. 2d 323 (1981); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346 (1973); *General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178, 58 S. Ct. 849, 851, 82 L. Ed. 1273 (1938); *United States v. Johnston*, 268 U.S. 220, 227, 45 S. Ct. 496, 497, 69 L. Ed. 2d 925 (1925). The limited resources of this Court dictate that it grant certiorari only

> in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real

> and embarrassing conflict of opinion and authority between the circuit courts of appeal.

NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 502, 71 S. Ct. 453, 455, 95 L. Ed. 479 (1951). Therefore, the petition should be denied.

In any event, the Eleventh Circuit's material findings are correct. Reynolds first criticizes the Eleventh Circuit for declining to accept her argument that a comment about another temporary heard third-hand by Linda Elson, an employee in another department, from a source Elson could not recall at trial, was "notice" to CSXT of prior sexual harassment.

Reynolds' criticism is misplaced. The Eleventh Circuit incorporated in its opinion all of the "facts" Reynolds attempts to reargue here, and it expressly viewed all evidence in the light most favorable to Reynolds. 115 F.3d at 866. Elson testified that she believed that if a complaint were brought to her attention that she construed as a "complaint of sexual harassment," she had an obligation to report it to "higher management." However, the Eleventh Circuit's finding is consistent with Reynolds' failure to establish that Elson acted unreasonably upon hearing from someone other than Turner that Widney made an inappropriate comment about Turner's pregnancy. Elson testified that she didn't repeat the information because she took it as gossip; because the temporary employee did not come forward herself to say that the comment was made; and because she did not supervise Widney and was in a completely different department. Furthermore, the Eleventh Circuit correctly noted the absence of a legal duty on the part of Elson to report this remark to higher management, regardless of her own belief that she should report "complaints."

With regard to the absence of causal connection between Reynolds' complaints and the elimination of her position in February, 1993, Reynolds also seeks certiorari by reciting selected

facts and drawing inferences that focus solely on a "Position Paper" Duguid wrote about temporaries in December, 1992.[7] The recitation of these facts is wrong and contradicts the record discussed on pages 4-5 above. The Eleventh Circuit, which had before it the entire record and the parties' briefs, properly found that replacement of temporaries with permanent employees losing their jobs elsewhere was legally insufficient to establish a causal connection. This part of the petition is no more than a reargument of facts and inferences already decided by the Eleventh Circuit, and Reynolds' petition must be denied.

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7. Reynolds seeks to misdirect the Court by placing exaggerated emphasis on one sentence in the Eleventh Circuit's factual recitation. Reynolds states that the "single most important erroneous factual finding" by the Eleventh Circuit was that Hamilton further testified that CSXT planned to relocate the temporary staffers to the real estate area, which was in need of more workers for a particular project." While the Eleventh Circuit's statement is slightly misworded, the actual testimony was even stronger in CSXT's favor: other *surplus* employees (such as those who were replacing the temporaries in the file room and one in the Medical Department) were going to work in the real estate area on a project where the plan had been to use temporaries. Reynolds does not explain how correcting this slight miswording would help her demonstrate a causal connection between her complaints and the elimination of her position.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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